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No. 06-1431

FILED
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SUPREME COURT, U.S.

# In the Supreme Court of the United States

CBOCS WEST, INC.,
*Petitioner*,

v.

HEDRICK G. HUMPHRIES,
*Respondent*.

*On Writ of Certiorari*
*to the United States Court of Appeals*
*for the Seventh Circuit*

## JOINT APPENDIX

Michael W. Hawkins
*Counsel of Record*
Michael J. Newman
DINSMORE & SHOHL LLP
Suite 1900
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8270
(513) 977-8141 fax
michael.hawkins@dinslaw.com
michael.newman@dinslaw.com
*Counsel for Petitioner*

Cynthia H. Hyndman
*Counsel of Record*
Aleeza M. Strubel
ROBINSON CURLEY
& CLAYTON, PC
300 S. Wacker Dr., Ste. 1700
Chicago, IL 60606
(312) 663-3100
(312) 663-0303 fax
chyndman@robinsoncurley.com
astrubel@robinsoncurley.com
*Counsel for Respondent*

Petition for Certiorari Filed April 25, 2007
Petition for Certiorari Granted September 25, 2007

Michael Zylstra
*General Counsel and*
*Vice President*
CBOCS West, Inc.
307 Hartmann Drive
P.O. Box 787
Lebanon, TN 37088
(615) 235-4006
(615) 443-9583 fax
michael.zylstra@crackerbarrel.com

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**United States District Court**
**Northern District of Illinois**

**CIVIL DOCKET FOR CASE #: 1:03-cv-03765**

Hedrick G. Humphries
Plaintiff,

v.

Cracker Barrel Restaurant #221
and CBOCS West, Inc.
Defendants.

**RELEVANT DOCKET ENTRIES**

| Date Filed | # | Docket Text |
|---|---|---|
| 06/02/2003 | 1 | RECEIVED COMPLAINT with no copies. (hp) (Entered: 06/04/2003) |
| 06/02/2003 | 2 | CIVIL cover sheet. (hp) (Entered: 06/04/2003) |
| 06/02/2003 | 3 | APPLICATION by plaintiff to proceed in forma pauperis and financial affidavit. (hp) (Entered: 06/04/2003) |
| 06/02/2003 | 4 | MOTION by plaintiff for appointment of counsel (hp) (Entered: 06/04/2003) |

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| 06/04/2003 | | FORWARDED complete case file to Judge Kocoras. (hp) (Entered: 06/04/2003) |
| 06/25/2003 | 5 | MINUTE ORDER of 6/25/03 by Hon. Charles P. Kocoras: Plaintiff's application to proceed in forma pauperis [3-1] and motion for appointment of counsel are denied [4-1]. (See reverse of minute order.) terminating case Mailed notice (jmp) Modified on 09/30/2003 (Entered: 06/26/2003) |
| 06/25/2003 | 6 | PRO SE ATTORNEY APPEARANCE by plaintiff (yap) (Entered: 06/27/2003) |
| 10/14/2003 | 7 | RECEIVED COMPLAINT by plaintiff (Attachment). (jmp) (Entered: 10/20/2003) |
| 10/14/2003 | 8 | APPLICATION by plaintiff to proceed in forma pauperis (jmp) (Entered: 10/20/2003) |
| 10/14/2003 | 9 | MOTION by plaintiff for appointment of counsel; (jmp) (Entered: 10/20/2003) |
| 10/22/2003 | 10 | MINUTE ORDER of 10/22/03 by Hon. Charles P. Kocoras: Plaintiff's amended petition to proceed in forma pauperis [8-1] |

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| | | and amended motion for appointment of counsel, are denied [9-1]. Mailed notice (jmp) (Entered: 10/23/2003) |
| 11/26/2003 | 15 | ATTORNEY APPEARANCE for defendant by John F. Kuenstler, and William R Pokorny (jmp) (Entered: 12/12/2003) |
| 11/26/2003 | 16 | MOTION by defendant to dismiss plaintiff's; Memorandum in support; (Attachments); Notice. (jmp) Modified on 12/12/2003 (Entered: 12/12/2003) |
| 12/02/2003 | 11 | APPLICATION by plaintiff Hedrick G Humphries to proceed in forma pauperis (jmp) (Entered: 12/05/2003) |
| 12/02/2003 | 12 | MOTION by plaintiff for appointment of counsel (Attachment). (jmp) (Entered: 12/05/2003) |
| 12/08/2003 | 13 | MINUTE ORDER of 12/8/03 by Hon. Charles P. Kocoras: Plaintiff's petition (Doc 11-1) to proceed in forma pauperis and motion (Doc 12-1) for appointment of counsel are denied. As stated, this is the third time that we have denied Humphries' petition and motion |

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| | | for appointment of counsel. No further petitions or motions for appointment will be entertained. If Humphries wishes to pursue his claim, he must pay the filing fee and either retain counsel or represent himself. (See reverse of minute order.) Mailed notice (lc) (Entered: 12/09/2003) |
| 12/08/2003 | 14 | ENTERED JUDGMENT (lc) (Entered: 12/09/2003) |
| 01/12/2004 | 17 | RECEIPT regarding payment of filing in the amount of $ 150.00 receipt # 103 22307. (jmp) (Entered: 01/14/2004) |
| 05/05/2004 | 18 | MINUTE ORDER of 5/5/04 by Hon. Charles P. Kocoras: Status hearing set for 9:30 a.m. on 06/01/04. Plaintiff having paid the filing fee on 0112/04, order cause reinstated. At the initial hearing, parties to report on the following: 1. Possibility of settlement. 2. If no possibility of settlement exists, the nature and length of discovery necessary to prepare the case for resolution. Plaintiff is directed to advise all other parties of the Courts' action herein. Lead counsel for each party is required to attend |

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| | | the initial hearing. Mailed notice (jmp) (Entered: 05/05/2004) |
| 05/07/2004 | 19 | ATTORNEY APPEARANCE for defendant by Beau C. Sefton. (jmp) (Entered: 05/11/2004) |
| 05/24/2004 | 20 | MOTION by defendant Cracker Barrel Rest to dismiss the plaintiff's complaint; Memorandum in support (Attachments); Notice. (jmp) (Entered: 06/10/2004) |
| 05/28/2004 | | SCHEDULE set on 5/28/04 by Hon. Charles P. Kocoras: Status hearing reset to 9:30 6/9/04. Telephone notice (sct) (Entered: 05/28/2004) |
| 06/09/2004 | 21 | MINUTE ORDER of 6/9/04 by Hon. Charles P. Kocoras: Answer brief to motion to dismiss the plaintiff's complaint [20-1] due 06/23/04. Reply to answer brief due 07/02/04. Ruling on defendant's motion to dismiss the plaintiff's complaint [20-1] set for 9:30 a.m. on 07/15/04. Status hearing held. Mailed. notice (jmp) (Entered: 06/10/2004) |
| 06/10/2004 | 22 | ATTORNEY APPEARANCE for plaintiff Hedrick G Humphries |

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| | | by Elizabeth J Hubertz (eav) (Entered: 06/15/2004) |
| 06/14/2004 | 23 | ATTORNEY APPEARANCE for plaintiff by Elizabeth J. Hubertz (gcy) (Entered: 06/15/2004) |
| 06/15/2004 | | MAILED Rule 83.16 letter and appearance form to Elizabeth J Hubertz (eav) (Entered: 06/15/2004) |
| 06/23/2004 | 24 | OPPOSITION by plaintiff to defendant's motion to dismiss the plaintiff's complaint [20-1]; Copy of unreported cases (Attachments); Notice. (jmp) Modified on 06/24/2004 (Entered: 06/24/2004) |
| 07/02/2004 | 25 | REPLY by defendant in support of its motion to dismiss the plaintiff's complaint [20-1]; Notice. (jmp) (Entered: 07/06/2004) |
| 07/15/2004 | 26 | MINUTE ORDER of 7/15/04 by Hon. Charles P. Kocoras: Status hearing set for 8/24/04 at 9:30 a.m. Ruling held. Enter memorandum opinion: Cracker Barrel's motion to dismiss is denied [20-1]. Humphries must properly effect service by 7/30/04. Failure to do so will result in |

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| | | dismissal of the complaint and suit. Entered Memorandum Opinion. Mailed notice (cem) (Entered: 07/16/2004) |
| 07/27/2004 | 27 | FIRST AMENDED COMPLAINT by plaintiff; jury demand (Attachment); Notice. (jmp) (Entered: 07/28/2004) |
| 08/16/2004 | 28 | WAIVER of service of summons as to defendant Cracker Barrel Rest sent on 7/28/2004. (jmp) (Entered: 08/17/2004) |
| 08/25/2004 | | SCHEDULE set on 8/25/04 by Hon. Charles P. Kocoras: Status hearing reset to 9:30 9/22/04. Mailed notice (sct) (Entered: 08/25/2004) |
| 09/14/2004 | 29 | MOTION by plaintiff Hedrick G Humphries for leave to file additional appearance of Angel M. Krull (Attachment); Notice. (jmp) (Entered: 09/17/2004) |
| 09/16/2004 | 30 | MINUTE ORDER of 9/16/04 by Hon. Charles P. Kocoras : Plaintiff's motion for leave to [29-1] file additional appearance of Angel M. Krull is granted [29-2]. Telephoned notice (jmp) (Entered: 09/17/2004) |

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| 09/16/2004 | 31 | ATTORNEY APPEARANCE for plaintiff by Angel Krull. (jmp) (Entered: 09/17/2004) |
| 09/17/2004 | 32 | ANSWER and additional defenses to plaintiff's first amended complaint by defendant [27-1]. (vmj) (Entered: 09/20/2004) |
| 09/17/2004 | 33 | MOTION by defendant Cracker Barrel Rest to dismiss plaintiff's complaint; Memorandum in support; Notice. (jmp) (Entered: 09/23/2004) |
| 09/22/2004 | 34 | MINUTE ORDER of 9/22/04 by Hon. Charles P. Kocoras: Status hearing held and continued to 9:30 a.m. on 02/22/05. Plaintiff's answer to defendant's motion to dismiss plaintiff's complaint [33-1] is due 10/06/04. Reply due 10/18/04. The Court will rule by mail. All discovery to be completed by 02/22/05. Mailed notice (jmp) (Entered: 09/23/2004) |
| 10/06/2004 | 35 | OPPOSITION by plaintiff Hedrick G Humphries to defendant's motion to dismiss plaintiff's claims under Title VII [33-1] (Attachments); Notice. (jmp) (Entered: 10/08/2004) |

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| 10/06/2004 | 36 | COURT'S COPY of unreportes cases cited by plaintiff Hedrick G Humphries (Attachments). (jmp) (Entered: 10/08/2004) |
| 10/18/2004 | 37 | REPLY by defendant Cracker Barrel Rest in support of its motion to dismiss plaintiff's claims under Title VII [33-1]; Notice. (jmp) (Entered: 10/19/2004) |
| 11/01/2004 | 38 | MINUTE ORDER of 11/1/04 by Hon. Charles P. Kocoras: We grant Cracker Barrel's motion to dismiss Humphries' claims under Title VII, with prejudice, on the basis that his Title VII claims were untimely filed [33-1]. Status hearing and close of discovery set for 2/22/05 to stand. Entered Memorandum Opinion. Mailed notice (gma) (Entered: 11/01/2004) |
| 11/04/2004 | 39 | LETTER from plaintiff Hedrick G Humphries to Michael W. Dobbins, Clerk dated 11/04/2004. (jmp) (Entered: 11/05/2004) |
| 01/13/2005 | 40 | MOTION by plaintiff to extend the discovery period; Notice. (gma) (Entered: 01/13/2005) |

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| 01/20/2005 | 41 | MINUTE entry before Judge Charles P. Kocoras: Motion for extension of the discovery period 40 is granted. Discovery ordered closed by 3/24/2005. Status hearing reset for 3/24/2005 at 09:30 AM. Mailed notices (sct, ) (Entered: 01/20/2005) |
| 03/24/2005 | 42 | MINUTE entry before Judge Charles P. Kocoras : Status hearing held on 3/24/2005. Defendant is given to 5/24/05 to file motion for summary judgment. Answer due by 6/14/2005. Reply due by 6/21/2005. Ruling before Honorable Charles P. Kocoras set for 7/13/2005 at 09:30 AM. Mailed notice. (sct, ) (Entered: 03/24/2005) |
| 05/16/2005 | 43 | AGREED MOTION by CBOCS West Inc. to extend summary judgment briefing schedule. (rbf, ) (Entered: 05/17/2005) |
| 05/16/2005 | 44 | NOTICE of Motion by John F. Kuenstler for presentment of agreed motion to extend summary judgment briefing schedule 43 before Honorable Charles P. Kocoras on 5/19/2005 at 09:30 AM. (rbf, ) (Entered: 05/17/2005) |

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| 05/19/2005 | 45 | MINUTE entry before Judge Charles P. Kocoras : Defendant's agreed motion 43 to extend summary judgment briefing schedule is granted. Defendant's motion for summary judgment is due 6/7/2005. Answer to said motion due 6/28/2005. Reply due 7/6/2005. Ruling reset from 7/13/2005 to 8/17/2005 at 9:30 a.m. Mailed notice. (sct, ) (Entered: 05/19/2005) |
| 06/07/2005 | 46 | MOTION by Defendant CBOCS West, Inc. for summary judgment; Notice. (jmp, ) (Entered: 06/14/2005) |
| 06/07/2005 | 47 | MEMORANDUM OF LAW by CBOCS West, Inc. in Support of its motion for summary judgment 46 (jmp, ) (Entered: 06/14/2005) |
| 06/07/2005 | 48 | STATEMENT of material facts by Defendant CBOCS West, Inc. in support of MOTION by Defendant CBOCS West, Inc. for summary judgment 46 (Attachments). (jmp, ) (Entered: 06/14/2005) |
| 06/28/2005 | 49 | MOTION by Plaintiff Hedrick G Humphries to strike declaration |

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| | | of Kimberly Tramel (gma, ) (Entered: 06/28/2005) |
| 06/28/2005 | 50 | NOTICE of Motion by Angel Krull for presentment of MOTION by Plaintiff Hedrick G Humphries to strike declaration of Kimberly Tramel 49 before Honorable Charles P. Kocoras on 6/30/2005 at 09:30 AM. (gma,) (Entered: 06/28/2005) |
| 06/28/2005 | 51 | MEMORANDUM by Hedrick G Humphries in Support of MOTION by Plaintiff Hedrick G Humphries to strike declaration of Kimberly Tramel 49 (gma, ) (Entered: 06/28/2005) |
| 06/28/2005 | 52 | RESPONSE by Hedrick G Humphries to MOTION by Defendant CBOCS West, Inc. for summary judgment 46 (jmp, ) Modified on 8/7/2007 (air, ). (Entered: 06/30/2005) |
| 06/28/2005 | 53 | LOCAL RULE 56.1 statement of material facts by plaintiff. (jmp, ) Modified on 8/7/2007 (air, ). (Entered: 06/30/2005) |
| 06/28/2005 | 54 | APPENDIX by Hedrick G Humphries in support of his Local Rule 56.1 statement of |

material facts 53 (Exhibits). (jmp, ) (Entered: 06/30/2005)

06/30/2005 55 MINUTE entry before Judge Charles P. Kocoras: Motion hearing held on plaintiff's motion to strike declaration of Kimberly Tramel. Defendant is given to 7/14/2005 to supplement the affidavit or to respond to said motion to strike. Plaintiff's reply is due 7/21/2005. Defendant's oral motion for an extension of time to 7/14/2005 to file reply in support of its motion for summary judgment, is granted. Ruling set for 8/17/2005 is stricken. The Court will rule on all pending motions by mail. Mailed notice (jmp, ) (Entered: 07/01/2005)

07/14/2005 56 REPLY by defendant CBOCS West, Inc. in support of its motion for summary judgment 46 ; Notice. (mjc, ) (Entered: 07/18/2005)

07/14/2005 57 RESPONSE by defendant CBOCS West, Inc. to plaintiff's motion to strike declaration of Kimberly Tramel 49 ; Notice. (mjc, ) (Entered: 07/18/2005)

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| 07/14/2005 | 58 | RESPONSE by Defendant CBOCS West, Inc. to plaintiff's "statement of additional facts that require denial of summary judgment; Notice (Exhibits). (gcy, ) (Entered: 07/19/2005) |
| 07/21/2005 | 61 | REPLY by Hedrick G Humphries in Support of MOTION by Plaintiff Hedrick G Humphries to strike declaration of Kimberly Tramel 49 (Exhibit); Notice. (jmp, ) (Entered: 07/25/2005) |
| 07/22/2005 | 59 | MOTION by Plaintiff Hedrick G Humphries for leave to file supplemental authority in opposition to defendant's motion for summary judgment (gma, ) (Entered: 07/22/2005) |
| 07/22/2005 | 60 | NOTICE of Motion by Angel Krull for presentment of MOTION by Plaintiff Hedrick G Humphries for leave to file supplemental authority in opposition to defendant's motion for summary judgment 59 before Honorable Charles P. Kocoras on 8/2/2005 at 09:30 AM. (gma, ) (Entered: 07/22/2005) |
| 07/26/2005 | 62 | RESPONSE by defendants Cracker Barrel Restaurant #221, CBOCS West, Inc. to plaintiff's |

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| | | motion for leave to file supplemental authority in opposition to defendant's motion for summary judgment; Notice. (cdy, ) (Entered: 07/29/2005) |
| 08/01/2005 | 63 | MINUTE entry before Judge Charles P. Kocoras : Plaintiff's motion 59 for leave to file supplemental authority in opposition to defendant's motion for summary judgment, is granted. Mailed notice (sct, ) (Entered: 08/01/2005) |
| 10/06/2005 | 64 | MEMORANDUM OPINION Signed by Judge Charles P. Kocoras on 10/6/2005: Cracker Barrel's motion for summary judgment is granted. Humphries' motion to strike the declaration of Kimberly Tramel is denied as moot. Final Judgment entered. Case Terminated. Mailed notice(sct, ) (Entered: 10/06/2005) |
| 10/06/2005 | 65 | ENTERED JUDGMENT on 10/6/2005. Mailed notice(sct, ) (Entered: 10/06/2005) |
| 10/17/2005 | 66 | NOTICE of appeal by Hedrick G Humphries regarding orders 65, 64 ; Filing fee $ 255.00 paid; |

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| | | Receipt number 10714119 (dj, ) (Entered: 10/18/2005) |
| 10/17/2005 | 67 | DOCKETING Statement by Hedrick G Humphries regarding notice of appeal 66 ; Notice of Filing. (dj, ) (Entered: 10/18/2005) |
| 10/18/2005 | 68 | TRANSMITTED to the 7th Circuit the short record on 10/18/05 notice of appeal66. Notified counsel (dj, ) Additional attachment(s) added on 10/18/2005 (dj, ). (Entered: 10/18/2005) |
| 10/21/2005 | 69 | DESIGNATION by plaintiff of items to be included in record on appeal. (dj, ) (Entered: 10/24/2005) |
| 10/21/2005 | 72 | ACKNOWLEDGEMENT of receipt of short record on appeal regarding notice of appeal66 ; USCA Case No. 05-4047. (cem, ) (Entered: 10/27/2005) |
| 10/25/2005 | 70 | BILL of Costs by CBOCS West, Inc. (Sefton, Beau) (Entered: 10/25/2005) |
| 10/25/2005 | 71 | DECLARATION of Beau C. Sefton regarding bill of costs 70 by CBOCS West, Inc. |

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| | | (Attachments: # 1 Exhibit A# 2 Exhibit B)(Sefton, Beau) (Entered: 10/25/2005) |
| 10/27/2005 | 73 | MINUTE entry before Judge Charles P. Kocoras: Answer to defendant's Bill of Costs is due 11/17/2005. Reply due 12/2/2005. The Court will rule by mail. Mailed notice (sct, ) (Entered: 10/27/2005) |
| 11/03/2005 | 74 | TRANSMITTED to the USCA for the 7th Circuit the long record on appeal 66 (USCA no. 05-4047) consisting of 2 volumes of pleadings and 3 volumes of loose pleadings. (gej, ) Additional attachment(s) added on 11/7/2005 (gej, ). (Entered: 11/03/2005) |
| 11/04/2005 | 75 | RESPONSE by Plaintiff Hedrick G Humphries to bill of costs70, declaration71 (Attachments: # 1 Exhibit Maximum Transcript Rates)(Krull, Angel) (Entered: 11/04/2005) |
| 11/04/2005 | 76 | NOTICE by Hedrick G Humphries re Response75 (Krull, Angel) (Entered: 11/04/2005) |

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| 12/02/2005 | 77 | REPLY by Defendant CBOCS West, Inc. *In Support of Its Bill of Costs* (Attachments: # 1 Exhibit Exhibit A)(Kuenstler, John) (Entered: 12/02/2005) |
| 12/06/2005 | 78 | NOTICE by John F. Kuenstler of Change of Address (Attachments: # 1 Notification of Change)(Kuenstler, John) (Entered: 12/06/2005) |
| 12/20/2005 | 79 | MINUTE entry before Judge Charles P. Kocoras : This matter comes before the court on the request of Defendant CBOCS West, Inc. ("Cracker Barrel"), for a bill of costs for fees associated with depositions, transcripts, and copies of documents associated with their case. For the reasons set forth below, we award costs in the amount of $1,551.10. Mailed notice (sct, ) (Entered: 12/20/2005) |
| 02/21/2006 | 80 | MOTION by Defendants Cracker Barrel Restaurant #221, CBOCS West, Inc. to withdraw as attorney *(Unopposed)* (Sefton, Beau) (Entered: 02/21/2006) |
| 02/21/2006 | 81 | NOTICE of Motion by Beau C. Sefton for presentment of motion to withdraw as attorney80 before |

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| | | Honorable Charles P. Kocoras on 2/28/2006 at 09:30 AM. (Sefton, Beau) (Entered: 02/21/2006) |
| 02/27/2006 | 82 | MINUTE entry before Judge Charles P. Kocoras : Beau C. Sefton and William R. Pokorny, and their law firm, Wildman, Harrold, Allen & Dixon, LLP's motion 80 to withdraw as counsel for defendant is granted. Hearing on said motion set for 2/28/06 is stricken. Attorney William R Pokorny and Beau C. Sefton terminated. Mailed notice (eav, ) (Entered: 02/28/2006) |
| 02/06/2007 | 83 | MINUTE entry before Judge Charles P. Kocoras :Status hearing set for 2/22/2007 at 09:30 a.m. before Judge Kocoras.Mailed notice (sct, ) (Entered: 02/06/2007) |
| 02/06/2007 | 84 | CERTIFIED copy of order dated January 10, 2007 from the Seventh Circuit regarding notice of appeal66 ; Appellate case no. : 05-4047. We Reverse the District Court's grant of summary judgment in favor of the defendant on Humphries's retaliation claim, we Affirm the grant of summary judgment in favor of the defendant on |

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| | | Humphries's discrimination claim and we Remand for further proceedings in accordance with the opinion. The above is in accordance with the decision of this court entered on this date. Each party to bear its own costs. (eav, ) (Entered: 02/08/2007) |
| 02/06/2007 | 85 | OPINION from the USCA for the 7th Circuit; Argued March 28, 2006; Decided January 10, 2007 in USCA case no. 05-4047 (eav, ) (Entered: 02/08/2007) |
| 02/06/2007 | 86 | LETTER from the Seventh Circuit returning the record on appeal in USCA no. 5-4047 consisting of 2 volumes of pleadings and 3 volumes of loose pleadings (eav, ) (Entered: 02/08/2007) |
| 02/13/2007 | 87 | MINUTE entry before Judge Charles P. Kocoras :Status hearing set for 2/22/2007 is reset to 3/1/2007 at 09:30 AM.Mailed notice (sct, ) (Entered: 02/13/2007) |
| 02/21/2007 | 88 | ATTORNEY Appearance for Defendant CBOCS West, Inc. by Camille B. Conway (Conway, Camille) (Entered: 02/21/2007) |

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| 02/22/2007 | 89 | ATTORNEY Appearance for Plaintiff Hedrick G Humphries by Cynthia H. Hyndman (Hyndman, Cynthia) (Entered: 02/22/2007) |
| 03/01/2007 | 90 | MINUTE entry before Judge Charles P. Kocoras :Status hearing held on 3/1/2007. This cause having been remanded from the U.S. Court of Appeals for the Seventh Circuit, the Clerk of the District Court is directed to reinstate this case pursuant to the decision of the Court of Appeals. Plaintiff is given leave to file the appearance of Cynthia Hyndman as additional counsel. Defendant is given leave to file the appearance of Camille Conway as additional counsel. Plaintiff's oral motion to vacate the judgment order awarding costs to defendants is granted. So ordered. Status hearing set for 4/3/07 at 9:30 a.m. Attorney Cynthia H. Hyndman for Hedrick G Humphries, Camille B. Conway for Cracker Barrel Restaurant added. Mailed notice (eav, ) (Entered: 03/02/2007) |

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| 03/02/2007 | | MAILED Rule 83.16 letter and appearance forms to attorneys Cynthia Hyndman and Camille Conway (eav, ) (Entered: 03/02/2007) |
| 04/03/2007 | 91 | MINUTE entry before Judge Charles P. Kocoras :Status hearing held on 4/3/2007. Pretrial Order to be filed on or before 5/4/2007. The Pretrial Order shall contain the following: 1. Agreed statement of material facts; 2. Lists of witnesses; 3. Lists of exhibits; and 4. Proposed voir dire. The Pretrial Order shall also contain the following: 1. Estimated length of trial; 2. Whether the trial is bench or jury; and 3. Whether all parties consent, or do not consent to proceed before a magistrate judge. Mailed notice (sct, ) (Entered: 04/03/2007) |
| 05/03/2007 | 92 | ATTORNEY Appearance for Plaintiff Hedrick G Humphries by Aleeza M Strubel (Strubel, Aleeza) (Entered: 05/03/2007) |
| 05/04/2007 | 93 | PROPOSED Pretrial Order by Hedrick G Humphries, CBOCS West, Inc. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 |

Exhibit E# 6 Exhibit F# 7 Exhibit G)(Krull, Angel) (Entered: 05/04/2007)

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| 07/26/2007 | 94 | MOTION by counsel for Plaintiff Hedrick G Humphries to withdraw as attorney (Krull, Angel) (Entered: 07/26/2007) |
| 07/26/20007 | 95 | NOTICE of Motion by Angel Krull for presentment of motion to withdraw as attorney94 before Honorable Charles P. Kocoras on 7/31/2007 at 09:30 AM. (Krull, Angel) (Entered: 07/26/2007) |
| 07/30/2007 | 96 | MINUTE entry before Judge Charles P. Kocoras : Angel M. Krull's motion for leave to withdraw as counsel for plaintiff is granted. Hearing on said motion, set for 7/31/2007, is stricken. Attorney Angel Krull terminated.Mailed notice (mjc, ) (Entered: 07/31/2007) |

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

**Case #: 05-4047**

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| Hedrick G. Humphries<br>Plaintiff-Appellant | )<br>) |
| v. | ) |
| CBOCS West, Incorporated<br>Defendant-Appellee. | )<br>) |

## RELEVANT DOCKET ENTRIES

| | |
|---|---|
| 10/19/05 | Private civil case docketed. [05-4047] [1914589-1] Transcript information sheet due 10/31/05. Appellant's brief due 11/28/05 for Hedrick G. Humphries. (amyd) |
| 10/19/05 | [05-4047] ROA from No. Dist. of Il., E. Div. due 11/7/05. (amyd) |
| 10/19/05 | Filed Appellant Hedrick G. Humphries docketing statement. [05-4047] [1914594-1] (amyd) |
| 10/21/05 | Disclosure Statement filed by Angel M. Krull for Appellant Hedrick G. Humphries. [05-4047] [1914589-1] (hard) |
| 10/21/05 | Filed Seventh Circuit Transcript Information Sheet by Angel M. Krull for |

Appellant Hedrick G. Humphries. [05-4047] [1914589-1] (hudk)

10/24/05 ORDER: Pursuant to Circuit Rule 33, briefing will proceed as follows: [1914589-1] SCO [05-4047] Appellant's brief due 12/12/05 for Hedrick G. Humphries. Appellee's brief due 1/11/06 for CBOCS West Inc . Appellant's reply brief due 1/25/06 for Hedrick G. Humphries. (hard)

11/4/05 Original record on appeal filed. Contents of record: 2 vol. pleadings; 3 vol. loose pleadings. [05-4047] [1919803-1] (darr)

11/7/05 Disclosure Statement filed by John F. Kuenstler for Appellee CBOCS West Inc. [05-4047] [1914589-1] (amyd)

11/14/05 ORDER: Pursuant to Circuit Rule 33, briefing will proceed as follows: [1914589-1] SCO [05-4047] Appellant's brief due 12/19/05 for Hedrick G. Humphries. Appellee's brief due 1/18/06 for CBOCS West Inc. Appellant's reply brief due 2/1/06 for Hedrick G. Humphries. (amyd)

12/19/05 Filed 15c appellant's brief by Hedrick G. Humphries. Disk filed. [05-4047] [0-0] (kare)

| | |
|---|---|
| 1/17/06 | NOTICE: Angel M. Krull for Appellant Hedrick G. Humphries will not be available for oral argument Feb. 16, 27 - March 10, 2006. [05-4047] [1914589-1] (andb) |
| 1/18/06 | Filed 15c appellee's brief by CBOCS West Inc. Electronically Transmitted. [05-4047] [0-0] (andb) |
| 2/1/06 | Filed 15c appellant's reply brief by Hedrick G. Humphries. Disk filed. [05-4047] [0-0] (josh) |
| 2/6/06 | ORDER: Argument set for Tuesday, March 28, 2006 at 9:30 a.m. Each side limited to 15 minutes. [05-4047] [1951781-1](linj) |
| 2/9/06 | Oral argument confirmation card filed by attorney(s) Angel M. Krull for Appellant Hedrick G. Humphries. [05-4047] [1914589-1] (scze) |
| 3/6/06 | Oral argument confirmation card filed by attorney(s) John F. Kuenstler for Appellee CBOCS West Inc. [05-4047] [1914589-1] (scze) |
| 3/28/06 | Case heard and taken under advisement by panel: Circuit Judge Richard A. Posner, Circuit Judge Frank H. Easterbrook, Circuit Judge Ann C. Williams. [05-4047] [1969139-1] (scze) |

| | |
|---|---|
| 3/28/06 | Case argued by John F. Kuenstler for Appellee CBOCS West Inc, Angel M. Krull for Appellant Hedrick G. Humphries. [05-4047] [1914589-1] (scze) |
| 1/10/07 | Filed opinion of the court by Judge Williams. We REVERSE the district court's grant of summary judgment in favor of the defendant on Humphries's retaliation claim, we AFFIRM the grant of summary judgment in favor of the defendant on Humphries's discrimination claim, and we REMAND for further proceedings in accordance with the opinion. Chief Judge Frank H. Easterbrook, dissenting, Circuit Judge Richard A. Posner, Circuit Judge Ann C. Williams. [05-4047] [1914589-1] (amyd) |
| 1/10/07 | ORDER: Final judgment filed per opinion. Each party to bear its own costs. [05-4047] [2063083-1] (amyd) |
| 1/24/07 | Filed 15c Petition for Rehearing by Appellee CBOCS West Inc. Dist. [05-4047] [2068412-1] (fern) |
| 1/29/07 | ORDER: Appellee CBOCS West Inc Petition for Rehearing is DENIED. [05-4047] [2068412-1] (fern) |
| 2/6/07 | MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 2 vol. pleadings; 3 vol. loose pleadings.) [05-4047] [1914589-1] (cove) |

| | |
|---|---|
| 2/12/07 | Filed mandate receipt. [05-4047] [2074095-1] (linj) |
| 5/3/07 | Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 06-1431. [05-4047] [2100293-1] (fern) |
| 10/1/07 | Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. See order for further details. Supreme Court Case No.: 06-1431. [05-4047] [2146723-1[ (hard) |

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**_____DIVISION**

**CIVIL ACTION NO. 03C 3765**

**[Filed June 2, 2003]**

| | |
|---|---|
| Hedrick G. Humphries | ) |
| | ) |
| (Name of the plaintiff or plaintiffs) | ) |
| | ) |
| V. | ) |
| | ) |
| Cracker Barrel | ) |
| Restaurant #221 | ) |
| | ) |
| (Name of the defendant or defendants) | ) |
| | ) |

**COMPLAINT OF EMPLOYMENT DISCRIMINATION**

1. This is an action for employment discrimination.

2. The plaintiff is Hedrick G. Humphries of the county of Cook in the state of Illinois.

3. The defendant is Cracker Barrel Restaurant #221, who resides at (street address) 50 Ken Hayes Drive (city) Bradley (county) Kankakee (state) IL (ZIP) 60915 (Defendant's telephone number) (815)-936-6055

4) The plaintiff sought employment or was employed by the defendant at (street address) 50 Ken Hayes Drive (city) Bradley (county) Kankakee (state) IL (ZIP code) 60915

5. The plaintiff [check one box]

* * *

(c) ☒ was employed but is no longer employed by the defendant.

6. The defendant discriminated against the plaintiff on or about, or beginning on or about, (month) October (day) 8, (year) 2001.

7. (a) The plaintiff [check one box] ☒ has filed a charge or charges against the defendant asserting the acts of discrimination indicated in this complaint with any of the following government agencies:

(i) ☒ the United States Equal Employment Opportunity Commission on or about (month) August (day) 9 (year) 2002.

* * *

(b) If charges *were* filed with an agency indicated above, a copy of the charge is attached. ☒ YES

It is the policy of both the Equal Employment Opportunity Commission and the Illinois Department of Human Rights to cross-file with the other agency all

charges received. The plaintiff has no reason to believe that this policy was not followed in this case.

8.

* * *

(b) ☒ the United States Equal Employment Opportunity Commission has issued a *Notice of Right to Sue*, which was received by the plaintiff on (month) March (day) 06 (year) 03 a copy of which *Notice* is attached to this complaint.

9. The defendant discriminated against the plaintiff because of the plaintiff's [check all that apply]

* * *

(b) ☒ Color (Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981).

* * *

(e) ☒ Race (Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981).

* * *

10. The plaintiff is suing the defendant, a state or local government agency, for discrimination on the basis of race, color, or national origin (42 U.S.C. § 1983).

☒ YES

11. Jurisdiction over the statutory violation alleged is conferred as follows: over Title VII claims by 28 U.S.C. §1331, 28 U.S.C. §1343(a)(3), and 42 U.S.C. §2000e-5(f)(3); over 42 U.S.C. §1981 and §1983 by 42 U.S.C. §1988; over the A.D.E.A. by 42 U.S.C. §12117.

12. The defendant [check all that apply]

* * *

(b) ☒ terminated the plaintiff's employment.

* * *

13. The facts supporting the plaintiff's claim of discrimination are as follows:

— September 03 2001 I received a write-up from Steve Cardin (acting G.M.) that the chain was not on the door. No dates of incident or evidence was ever provide. Write-up was used to terminate my employment.

— Made racially offensive comments to staff indicating "He was there for white employees." And wanted more white managers at the store.

— ~~November 26 2001 was ret~~

— December 05 2001 I was written-up and terminated for leaving the safe open, which was never verified or evidenced, as retaliation for citing discriminatory activity by white manager.

14. [AGE DISCRIMINATION ONLY] Defendant knowingly, intentionally, and willfully discriminated against the plaintiff.

15. The plaintiff demands that the case be tried by a jury. ☒ NO

16. THEREFORE, the plaintiff asks that the court grant the following relief to the plaintiff [check all that apply]

* * *

(f) ☒ Direct the defendant to (specify): Punitive damages for job discrimination and retaliation

(g) ☒ If available, grant the plaintiff appropriate injunctive relief, lost wages, liquidated/double damages, front pay, compensatory damages, punitive damages, prejudgment interest, post-judgment interest, and costs, including reasonable attorney fees and expert witness fees.

* * *

(Plaintiff's signature) /s/
(Plaintiff's name) Hedrick G. Humphries
(Plaintiff's street address) [REDACTED]
(City) Matteson (State) IL (ZIP) 60443
(Plaintiff's telephone number) (708)-748-[REDACTED]

**Equal Employment Opportunity Commission**

**DISMISSAL AND NOTICE OF RIGHTS**

To: Hedrick G. Humphries
[REDACTED]
Matteson, IL 60443

From: Equal Employment Opportunity Commission
Chicago District Office
500 West Madison Street
Suite 2800
Chicago, Illinois 60661

Certified Mail No.: 7001 1940 0003 8832 3641

[ ] *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))*

| **Charge No.** | **EEOC Representative** |
|---|---|
| 210A203462 | Karen Lanners, Investigator |

**Telephone No.**
312-353-0902

*(See the additional information attached to this form.)*

YOUR CHARGE IS DISMISSED FOR THE FOLLOWING REASON:

* * *

[X] The Commission issues the following determination: Based upon the Commission's investigation, the Commission is unable to

conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

* * *

**- NOTICE OF SUIT RIGHTS -**

[X] **Title VII and/or the Americans with Disabilities Act:** This is your NOTICE OF RIGHT TO SUE, which terminates the Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in a court of competent jurisdiction. **If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice; otherwise your right to sue is lost.**

* * *

On behalf of the Commission

3-3-03 /s/
John P. Rowe, District Director

Enclosures
Information Sheet
Copy of Charge

cc: Respondent(s) Cracker Barrel Old Country Store
EEOC Form 161 (test 5/95)

# CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY ☒ EEOC

CHARGE NUMBER 210A203462

Illinois Dept. of Human Rights and EEOC
*State or local Agency, if any*

NAME *(Indicate Mr., Ms., Mrs.)*
Mr. Hedrick G. Humphries

HOME TELEPHONE *(Include Area Code)*
(708) 748-[REDACTED]

STREET ADDRESS CITY, STATE AND ZIP CODE
[REDACTED], Matteson, IL 60443

DATE OF BIRTH
[REDACTED]/1948

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME
Cracker Barrel Old Country Store

NUMBER OF EMPLOYEES, MEMBERS
Cat D (501 +)

TELEPHONE *(Include Area Code)*
(815) 936-6022

STREET ADDRESS CITY, STATE AND ZIP CODE
50 Ken Hayes Dr., Bradley, IL 60915

COUNTY
091

* * *

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☒ RACE

DATE DISCRIMINATION TOOK PLACE

| *EARLIEST* | *LATEST* |
|---|---|
| 12/05/2001 | 12/05/2001 |

☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

I began my employment with Respondent on or around November 23, 1998. My most recent position was Associate Manager. Beginning in or around August 2001, the store location where I was assigned came under new management. I began to be subjected to unfair and unjustified disciplinary write-ups while white managers I worked with had engaged in the same activities I had and were not disciplined. A

General Manager also made offensive comments about other employees based upon their race and national origin, which I reported to my District Manager. In or around early December 2001, I discussed with respondent General Manager and District Manager a concern that Respondent was not subjecting black and white employees to the same performance standards and that black employees were subjected to less favorable standards. The District Manager responded by telling me that I should not appear to "be outside the management group." On or around December 5, 2001, I was allegedly terminated as a result of the disciplinary write-ups despite my protests. I believe that Respondent store management and also Respondent district management has engaged in a practice of subjecting all black employees to less favorable treatment than white employees. I further believe that Respondent has engaged in a practice of replacing black employees with white employees and reducing the number of black employees.

I believe I was retaliated against and discriminated against on the basis of my race, black, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

8-9-02 /s/ Hedrick G. Humphries
Date Charging Party *(Signature)*

NOTARY -

* * *

EEOC FORM 5 (Rev. 07/99)

AO 440 (Rev. 05/00) Summons in a Civil Action

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**SUMMONS IN A CIVIL CASE**

CASE NUMBER: 03 C 3765
ASSIGNED JUDGE: KOCORAS

Hedrick G. Humphries

v.

Cracker Barrel Restaurant
#221 Bradley IL.

TO: (Name and address of Defendant)

Cracker Barrel Restaurant
50 Ken Hayes Dr.
Bradley IL. 60915

**YOU ARE HEREBY SUMMONED** and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

Hedrick G. Humphries
[REDACTED]
Matteson, IL. 60443

an answer to the complaint which is herewith served upon you, _____ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken

against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

MICHAEL W. DOBBINS, CLERK

_____ _____

(By) DEPUTY CLERK DATE

**RETURN OF SERVICE**

Service of the Summons and complaint was made by me[1]

DATE 10-14-03

NAME OF SERVER *(Print)*
Hedrick G. Humphries

*Check one box below to indicate appropriate method of service*

☒ Served personally upon the defendant. Place where served: 50 Ken Hayes Dr. Bradley IL. 60915

* * *

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on

_____ _____

Date Signature of Server

_____

Address of Server

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

**Case No. 03 C 3765**

**[Filed July 27, 2004]**

| | |
|---|---|
| HEDRICK G. HUMPHRIES, Plaintiff, | ) |
| v. | ) |
| CBOCS WEST, INC., Defendant. | ) |

The Honorable Charles Kocoras
JURY DEMANDED

## FIRST AMENDED COMPLAINT

Plaintiff Hedrick G. Humphries for his First Amended Complaint states as follows:

## THE PARTIES

1. Plaintiff Humphries is African-American. He is a resident of Matteson, Illinois, located in Cook County, Illinois. Humphries was formerly employed by the defendant as an associate manager of its Bradley, Illinois restaurant.

2. Defendant CBOCS West, Inc., is a Nevada corporation with its headquarters in Lebanon, Tennessee. The Defendant operates a chain of restaurants and retail locations known as "Cracker Barrel Old Country Stores." Each location consists of a restaurant, featuring "home-style cooking," and a retail area, featuring rural-themed items. The acts set forth in this Complaint were permitted, authorized, tolerated, ratified, ordered and/or done by Cracker Barrel officers, agents, employees and/or representatives while actively engaged in Cracker Barrel's business.

## JURISDICTION AND VENUE

3. This Court has jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3).

4. The employment practices alleged to be unlawful were committed within the Northern District of Illinois. Venue is therefore proper under 28 U.S.C. § 1391 and 42 U.S.C. § 2000e-(5)(f)(3).

5. Humphries has fulfilled all conditions precedent to the institution of this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Humphries timely filed his charge of race discrimination on August 9, 2002 within 300 days of the occurrence of the last discriminatory act. He filed his complaint in federal court within 90 days of his receipt of his Notice of Right to Sue from the EEOC. Copies of the Charge and the Notice of Right to Sue are attached hereto.

## STATEMENT OF CLAIM

6. The Plaintiff has worked in the restaurant industry for more than 13 years. He was hired as an associate manager of the Cracker Barrel restaurant located in the Kankakee-Bradley-Bourbonnais area (hereafter "the restaurant") in November 1998. At each restaurant, Cracker Barrel employs a General Manager who supervises several Associate General Managers. In turn, the general manager is supervised by a District Manager who has responsibility for several Cracker Barrel locations.

7. For nearly three years, Humphries performed his duties well. At the annual evaluation, conducted in November 2000, he was told that his performance was satisfactory, and he received a raise.

8. In August 2001, Cracker Barrel fired the general manager of the restaurant, Donald Sessions, an African-American. Sessions had been general manager at that location since approximately 1997. A white manager, Steve Cardin, was transferred from Cracker Barrel's Tinley Park, Illinois location to serve as Acting General Manager of the restaurant. Immediately following Cardin's arrival, nonwhite employees at the restaurant became the target of numerous disciplinary reports.

9. Cardin made it clear that he regarded it as his job to reduce the number of African-Americans employed by the restaurant. He assured the white employees that he was "there for the white [employees]." Two of Humphries' white co-workers informed him of Cardin's comments.

10. On several occasions, Cardin offered his (low) opinion of Cracker Barrel's nonwhite employees. On a day when one of the restaurant's African-American cooks was absent, Cardin stated in front of several employees that the cook "must be drunk or drugged." When Cardin was asked why he thought this, Cardin replied "you know how *they* all are." Similarly, while talking to Humphries, Cardin made a disparaging reference to employee Tony Munez' "ten kids." When Humphries asked Cardin where he got the idea that Munez had a large number of children, Cardin replied, "you know how they are, those Mexicans all have a dozen kids."

11. Humphries was naturally upset at being on the receiving end of racially motivated discipline, designed to reduce the number of African-American and other nonwhite employees at the restaurant. In keeping with Cracker Barrel's nondiscrimination policy, Humphries went to District Manager William Christensen, Cardin's supervisor, at the end of August 2001, and complained to him about a verbal warning he had received since Cardin's arrival and about Cardin's remarks. Christensen wanted to know if there were any other witnesses to the racial remarks. Humphries told him that there were, but they were afraid to come forward. Christensen told Humphries not to worry about it, but did not otherwise look into the complaint or take any remedial action.

12. On several occasions, Christensen and former General Manager Sessions had discussed Cardin's racism. Christensen told Sessions that Cardin could never be a general manager of a Cracker Barrel restaurant or "we'd be involved in political problems

all the time." Indeed, Cardin, who had earlier been employed at the Bradley location, asked for a transfer to another location when Sessions was elevated to General Manager at Bradley, because he did not want to be supervised by a black man.

13. Within a few days of Humphries' complaints to Christensen about the racial remarks and racially motivated discipline, he received three more written Employee Counseling Reports from Cardin, each described as "final."

14. On September 1, 2001, Humphries received a "final" disciplinary report for allegedly using the wrong method to credit an employee's meal. The second "final" report, also issued on September 1, alleged that there was a deviation from Cracker Barrel's standard procedures for accounting. In response to this report, Humphries subsequently discovered the nature of the discrepancy and provided the information to Cardin who in turn was to contact Cracker Barrel headquarters in Lebanon, Tennessee. Despite Humphries' provision of corrected information to Cardin, the disciplinary report was not removed from Humphries' file, even after Humphries complained to Christensen about it.

15. On September 3, 2001, the third Employee Counseling Report accused Humphries of leaving the restaurant door unchained, an action which would violate Cracker Barrel's Asset Protection Policy. The report did not specify when this alleged infraction occurred, or if anyone witnessed the alleged infraction, nor did it point to any harm that befell the restaurant as a result of this alleged infraction. Humphries had

not in fact left the door unchained and complained about this report to Christensen. Christensen insisted that there were witnesses to this incident but did not offer any further information.

16. In October, Cardin stepped down as Acting General Manager and returned to Tinley Park. Humphries was concerned that the racially motivated and retaliatory discipline he had received from Cardin would affect his annual evaluation. He expressed his concerns to Christensen. Christensen told Humphries that he would not consider the Cardin-originated discipline when evaluating Humphries' job performance. Humphries' annual review seemed to confirm what Christensen said, since he was given a satisfactory rating for the previous year's service (including the time in which he received the Employee Counseling Reports described above), was given a raise, and was thanked for his service by Christensen himself.

17. In late November 2001, Humphries witnessed the termination of an African-American server, Venus Green. Green was fired by one of Humphries' fellow Associate General Managers, a white man named Joe Stennett. Stennett, had been "on loan" to the restaurant from the Tinley Park Cracker Barrel location at the same time that Cardin had been temporarily transferred from Tinley Park to serve as Acting General Manager. Not only was Green's termination based on an incorrect perception of the facts, it also occurred without adherence to Cracker Barrel's established procedures for a person with her level of service - procedures that had been

accorded to white employees under similar circumstances.

18. Humphries complained about what he considered a racially disparate and wrongful termination to Christensen. Christensen told Humphries disapprovingly that he was going "outside of management" for raising these concerns about Green's termination, but that Humphries should schedule a meeting with Ken Dowd, the new white General Manager of the Bradley location, and with Humphries' fellow Associate Manager, Stennett, on December 6, 2001.

19. On December 5, before the meeting could take place, Humphries was terminated. At first, he was simply told that the safe was found open on Monday morning and that his employment would be terminated. No details, violations of procedure, or counseling reports were provided at that time. When he pressed for details, approximately one week later, he was given an Employee Counseling Report which informed him that he had been terminated for leaving the safe door open several nights earlier. The Report revealed that his accuser was Stennett, the co-manager who had wrongfully terminated Green and who had been summoned to a meeting with the Plaintiff to discuss her termination. Stennett was the only witness to Humphries' alleged infraction. No loss was alleged to have occurred as a result.

20. Upset at an unproven allegation to which he had been given no opportunity to respond coming so closely upon the heels of his latest discussion with Christensen about racism at the restaurant,

Humphries asked Christensen for a written explanation of the reason for his termination. Christensen wrote Humphries on December 12, informing him that he was terminated, not merely for leaving the safe open on December 2, 2001, but because in September 2001, Cardin had given him a "final written warning" about leaving the store door unchained.

21. As a result of the Defendant's racially discriminatory actions, Humphries experienced severe emotional distress. He suffered financial hardship because he was the sole breadwinner for his family. In addition, Cracker Barrel deemed Humphries' termination as being "for cause" within the meaning of its ERISA plans, and denied him access to profit-sharing and pension benefits to which he otherwise would have been entitled. He still has not recovered from these losses.

**COUNT I**
**DISCRIMINATION ON THE BASIS OF RACE IN VIOLATION OF 42 U.S.C. § 1981 AND TITLE VII**

22. The Plaintiff restates and incorporates by reference Paragraphs 1- 21 above as part of this Count of the Complaint.

23. Cracker Barrel has discriminated against the Plaintiff with regard to discipline and termination because of race, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981, as amended, and in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended.

24. Cracker Barrel's conduct, as described above, was intentional, deliberate, reckless, willful and conducted with disregard of the rights of Plaintiff.

25. By reason of International's discriminatory employment practices, the Plaintiff has experienced extreme harm, including loss of compensation, wages, back and front pay, and other employment benefits and, as such, is entitled to all legal and equitable remedies, available under Title VII, as amended, and section 1981, as amended, including compensatory and punitive damages.

## COUNT II
## RETALIATION IN VIOLATION OF SECTION 1981 AND TITLE VII

26. The Plaintiff restates and incorporates by reference Paragraphs 1-25 above as part of this Count of the Complaint.

27. Cracker Barrel has retaliated against the Plaintiff with regard to discipline and termination, in violation of 42 U.S.C. § 2000e-3 and 42 U.S.C. § 1981, as amended.

28. Cracker Barrel's conduct, as described above, was intentional, deliberate, reckless, willful and conducted with disregard of the rights of Plaintiff.

29. By reason of Cracker Barrel's discriminatory employment practices, the Plaintiff has experienced extreme harm, including loss of compensation, wages, back and front pay, emotional distress, anger, and other employment benefits and, as such, is entitled to

all legal and equitable remedies available, under Title VII as amended and under section 1981, as amended, including compensatory and punitive damages.

**WHEREFORE**, Plaintiff Humphries respectfully requests the following relief:

a. Compensatory damages, including back pay and compensation for past and future monetary and non-monetary losses;

b. Front-pay in lieu of reinstatement;

c Attorneys' fees and costs pursuant to 42 U.S.C. § 1988;

d. Liquidated and/or punitive damages; and

e. Any additional relief the Court deems just, including declaratory and injunctive relief.

**HEDRICK G. HUMPHRIES**

By: /s/ Elizabeth J. Hubertz
One of his attorneys

**PLAINTIFF DEMANDS A TRIAL BY JURY.**

By: /s/ Elizabeth J. Hubertz
One of his attorneys

Elizabeth J. Hubertz
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive • Suite 1700
Chicago, Illinois 60606
Phone: (312) 663-3100 • Facsimile: (312) 663-0303

# CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY ☒ EEOC

CHARGE NUMBER 210A203462

Illinois Dept. of Human Rights and EEOC
*State or local Agency, if any*

NAME *(Indicate Mr., Ms., Mrs.)*
Mr. Hedrick G. Humphries

HOME TELEPHONE *(Include Area Code)*
(708) 748-[REDACTED]

STREET ADDRESS CITY, STATE AND ZIP CODE
[REDACTED], Matteson, IL 60443

DATE OF BIRTH
[REDACTED]/1948

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME
Cracker Barrel Old Country Store

NUMBER OF EMPLOYEES, MEMBERS
Cat D (501 +)

TELEPHONE *(Include Area Code)*
(815) 936-6022

STREET ADDRESS CITY, STATE AND ZIP CODE
50 Ken Hayes Dr., Bradley, IL 60915

COUNTY
091

* * *

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☒ RACE

DATE DISCRIMINATION TOOK PLACE

| *EARLIEST* | *LATEST* |
|---|---|
| 12/05/2001 | 12/05/2001 |

☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

I began my employment with Respondent on or around November 23, 1998. My most recent position was Associate Manager. Beginning in or around August 2001, the store location where I was assigned came under new management. I began to be subjected to unfair and unjustified disciplinary write-ups while white managers I worked with had engaged in the same activities I had and were not disciplined. A

General Manager also made offensive comments about other employees based upon their race and national origin, which I reported to my District Manager. In or around early December 2001, I discussed with respondent General Manager and District Manager a concern that Respondent was not subjecting black and white employees to the same performance standards and that black employees were subjected to less favorable standards. The District Manager responded by telling me that I should not appear to "be outside the management group." On or around December 5, 2001, I was allegedly terminated as a result of the disciplinary write-ups despite my protests. I believe that Respondent store management and also Respondent district management has engaged in a practice of subjecting all black employees to less favorable treatment than white employees. I further believe that Respondent has engaged in a practice of replacing black employees with white employees and reducing the number of black employees.

I believe I was retaliated against and discriminated against on the basis of my race, black, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

8-9-02 /s/ Hedrick G. Humphries
Date Charging Party *(Signature)*

NOTARY -

* * *

EEOC FORM 5 (Rev. 07/99)

**Equal Employment Opportunity Commission**

**DISMISSAL AND NOTICE OF RIGHTS**

To: Hedrick G. Humphries
[REDACTED]
Matteson, IL 60443

From: Equal Employment Opportunity Commission
Chicago District Office
500 West Madison Street
Suite 2800
Chicago, Illinois 60661

Certified Mail No.: 7001 1940 0003 8832 3641

[ ] *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))*

| **Charge No.** | **EEOC Representative** |
|---|---|
| 210A203462 | Karen Lanners, Investigator |

**Telephone No.**
312-353-0902

*(See the additional information attached to this form.)*

YOUR CHARGE IS DISMISSED FOR THE FOLLOWING REASON:

* * *

[X] The Commission issues the following determination: Based upon the Commission's investigation, the Commission is unable to

conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

* * *

**- NOTICE OF SUIT RIGHTS -**

[X] **Title VII and/or the Americans with Disabilities Act:** This is your NOTICE OF RIGHT TO SUE, which terminates the Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in a court of competent jurisdiction. **If you decide to sue, you must sue <u>WITHIN 90 DAYS</u> from your receipt of this Notice; otherwise your right to sue is lost.**

* * *

On behalf of the Commission

3-3-03 /s/
John P. Rowe, District Director

Enclosures
Information Sheet
Copy of Charge

cc: Respondent(s) Cracker Barrel Old Country Store
EEOC Form 161 (test 5/95)

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

**Case No. 03 C 3765**
**Chief Judge Kocoras**

**[Filed September 17, 2004]**

| | |
|---|---|
| HEDRICK G. HUMPHRIES, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| CBOCS WEST, INC., | ) |
| | ) |
| Defendant. | ) |
| | ) |

**DEFENDANT'S ANSWER AND ADDITIONAL DEFENSES TO PLAINTIFF'S FIRST AMENDED COMPLAINT**

Defendant, CBOCS West, Inc. ("Defendant"), for its Answer and Additional Defenses to Plaintiff's First Amended Complaint, states as follows:[1]

[1] Concurrently with the instant Answer and Additional Defenses, Defendant has filed a Motion to Dismiss Plaintiff's Title VII claims.

**THE PARTIES**

1. Plaintiff Humphries is African-American. He is a resident of Matteson, Illinois, located in Cook County, Illinois. Humphries was formerly employed by the defendant as an associate manager of its Bradley, Illinois restaurant.

**ANSWER:**

On information and belief, Defendant admits that Plaintiff is African-American and that he is a resident of Matteson, Illinois. Defendant admits that Matteson, Illinois is located in Cook County, Illinois, and that Plaintiff was formerly employed by Defendant as an associate manager of its Bourbonnais, Illinois restaurant. Defendant denies the remaining allegations in Paragraph 1.

2. Defendant CBOCS West, Inc., is a Nevada corporation with its headquarters in Lebanon, Tennessee. The Defendant operates a chain of restaurants and retail locations known as "Cracker Barrel Old Country Stores." Each location consists of a restaurant, featuring "home-style cooking," and a retail area, featuring rural-themed items. The acts set forth in this Complaint were permitted, authorized, tolerated, ratified, ordered and/or done by Cracker Barrel officers, agents, employees and/or representatives while actively engaged in Cracker Barrel's business.

**ANSWER:**

Defendant admits that it is a Nevada corporation with its headquarters in Lebanon, Tennessee, that it operates a chain of restaurants and retail locations known as "Cracker Barrel Old Country Stores," and that each location consists of a restaurant featuring "homestyle cooking" and a retail area. Defendant denies the remaining allegations in Paragraph 2.

## JURISDICTION AND VENUE

3. This Court has jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3).

**ANSWER:**

Defendant states that Paragraph 3 calls for a legal conclusion and that Defendant is accordingly not required to answer. To the extent, however, that an answer is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 3.

4. The employment practices alleged to be unlawful were committed within the Northern District of Illinois. Venue is therefore proper under 28 U.S.C. § 1391 and 42 U.S.C. § 2000e-(5)(f)(3).

**ANSWER:**

Defendant admits that Plaintiff alleges that Defendant engaged in unlawful employment practices within the Northern District of Illinois, but denies that it engaged in unlawful employment practices.

Defendant states that the remaining allegations in Paragraph 4 call for a legal conclusion and that Defendant is accordingly not required to answer. To the extent, however, that an answer is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 4.

5. Humphries has fulfilled all conditions precedent to the institution of this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. Humphries timely filed his charge of race discrimination on August 9, 2002 within 300 days of the occurrence of the last discriminatory act. He filed his complaint in federal court within 90 days of his receipt of his Notice of Right to Sue from the EEOC. Copies of the Charge and the Notice of Right to Sue are attached hereto.

**ANSWER:**

Defendant admits that Plaintiff filed a charge of race discrimination on August 9, 2002, and that copies of the Charge and Notice of Right to Sue are attached to the First Amended Complaint. Defendant states that the remaining allegations in Paragraph 5 call for a legal conclusion and that Defendant is accordingly not required to answer. To the extent, however, that an answer is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 5.

**STATEMENT OF CLAIM**

6. The Plaintiff has worked in the restaurant industry for more than 13 years. He was hired as an associate manager of the Cracker Barrel restaurant located in the Kankakee-Bradley-Bourbonnais area (hereinafter "the restaurant") in November 1998. At each restaurant, Cracker Barrel employs a General Manager who supervises several Associate General Managers. In turn, the general manager is supervised by a District Manager who has responsibility for several Cracker Barrel locations.

**ANSWER:**

Defendant is without knowledge or information sufficient to form a belief as to the truth of Plaintiff's allegation that he has worked in the restaurant industry for more than 13 years. Defendant admits that Defendant hired Plaintiff in November 1998, and that Plaintiff subsequently was assigned to the position of Associate Manager at Defendant's unit #221, located in Bourbonnais, Illinois. Defendant admits that, generally, it employs a General Manager at each restaurant who supervises several Associate Managers, and its General Managers report to District Managers who have responsibility for several of Defendant's locations. Defendant denies the remaining allegations in Paragraph 6.

7. For nearly three years, Humphries performed his duties well. At the annual evaluation, conducted in November 2000, he was told that his performance was satisfactory, and he received a raise.

**ANSWER:**

Defendant admits that Plaintiff's rate of compensation was increased effective November 1, 2000. Defendant denies the remaining allegations in Paragraph 7.

8. In August 2001, Cracker Barrel fired the general manager of the restaurant, Donald Sessions, an African-American. Sessions had been general manager at that location since approximately 1997. A white manager, Steve Cardin, was transferred from Cracker Barrel's Tinley Park, Illinois location to serve as Acting General Manager of the restaurant. Immediately, following Cardin's arrival, nonwhite employees at the restaurant became the target of numerous disciplinary reports.

**ANSWER:**

Defendant admits that Donald Sessions was General Manager of unit #221 from 1997 until Defendant terminated his employment on or about July 19, 2001, and that Steve Cardin was transferred from Defendant's Tinley Park, Illinois location to serve as Acting General Manager of unit #221. On information and belief. Defendant admits that Sessions is an African-American and Cardin is white. Defendant denies the remaining allegations in Paragraph 8.

9. Cardin made it clear that he regarded it as his job to reduce the number of African-Americans employed by the restaurant. He assured the white employees that he was "there for the white

[employees]." Two of Humphries' white co-workers informed him of Cardin's comments.

**ANSWER:**

Defendant is without knowledge or information sufficient to form a belief as to the truth of Plaintiff's allegation that two of his white co-workers informed him of comments allegedly made by Cardin. Defendant denies the remaining allegations in Paragraph 9.

10. On several occasions, Cardin offered his (low) opinion of Cracker Barrel's nonwhite employees. On a day when one of the restaurant's African-American cooks was absent, Cardin stated in front of several employees that the cook "must be drunk or drugged." When Cardin was asked why he thought this, Cardin replied "you know how *they* all are." Similarly, while talking to Humphries, Cardin made a disparaging reference to employee Toni Munez' "ten kids." When Humphries asked Cardin where he got the idea that Munez had a large number of children, Cardin replied, "you know how they are, those Mexicans all have a dozen kids."

**ANSWER:**

Defendant denies the allegations in Paragraph 10.

11. Humphries was naturally upset at being on the receiving end of racially motivated discipline, designed to reduce the number of African-American and other nonwhite employees at the restaurant. In keeping with Cracker Barrel's nondiscrimination policy, Humphries went to District Manager William

Christensen, Cardin's supervisor, at the end of August 2001, and complained to him about a verbal warning he had received since Cardin's arrival and about Cardin's remarks. Christensen wanted to know if there were any other witnesses to the racial remarks. Humphries told him that there were, but they were afraid to come forward. Christensen told Humphries not to worry about it, but did not otherwise look into the complaint or take any remedial action.

**ANSWER:**

Defendant admits that it had a non-discrimination policy in effect at all relevant times. Defendant denies the remaining allegations in Paragraph 11.

12. On several occasions, Christensen and former General Manager Sessions had discussed Cardin's racism. Christensen told Sessions that Cardin could never be a general manager of a Cracker Barrel restaurant or "we'd be involved in political problems all the time." Indeed, Cardin, who had earlier been employed at the Bradley location, asked for a transfer to another location when Sessions was elevated to General Manager at Bradley, because he did not want to be supervised by a black man.

**ANSWER:**

Defendant admits that Cardin had earlier been employed at unit #221 and asked for a transfer to another location. Defendant denies the remaining allegations in Paragraph 12.

13. Within a few days of Humphries' complaints to Christensen about the racial remarks and racially motivated discipline, he received three more written Employee Counseling Reports from Cardin, each described as "final."

**ANSWER:**

Defendant admits that Plaintiff received multiple written Employee Counseling Reports, including three final written warnings issued by Cardin. Defendant denies the remaining allegations in Paragraph 13.

14. On September l, 2001, Humphries received a "final" disciplinary report for allegedly using the wrong method to credit an employee's meal. The second "final" report, also issued on September 1, alleged that there was a deviation from Cracker Barrel's standard procedures for accounting. In response to this report, Humphries subsequently discovered the nature of the discrepancy and provided the information to Cardin who in turn was to contact Cracker Barrel headquarters in Lebanon, Tennessee. Despite Humphries' provision of corrected information to Cardin, the disciplinary report was not removed from Humphries' file, even after Humphries complained to Christensen about it.

**ANSWER:**

Defendant admits that on September 1, 2001, Plaintiff received a final written warning because he improperly used a "Gold Card" in violation of company policy to process a complimentary meal, and that Plaintiff received a second final written warning on

September 1, 2001, because of a documented deposit shortage on Plaintiff's shift. Defendant denies the remaining allegations in Paragraph 14.

15. On September 3, 2001, the third Employee Counseling Report accused Humphries of leaving the restaurant door unchained, an action which would violate Cracker Barrel's Asset Protection Policy. The report did not specify when this alleged infraction occurred, or if anyone witnessed the alleged infraction, nor did it point to any harm that befell the restaurant as a result of this alleged infraction. Humphries had not in fact left the door unchained and complained about this report to Christensen. Christensen insisted that there were witnesses to this incident but did not offer any further information.

**ANSWER:**

Defendant admits that Plaintiff received an Employee Counseling Report on September 3, 2001 because he left the front door of unit #221 unchained, and that Plaintiff's failure to secure the front door violated Defendant's policies, including the Asset Protection Policy. Further answering, Defendant states that the Employee Counseling Report speaks for itself and denies Plaintiff's characterization of the same. Defendant denies the remaining allegations in Paragraph 15.

16. In October, Cardin stepped down as Acting General Manager and returned to Tinley Park. Humphries was concerned that the racially motivated and retaliatory discipline he had received from Cardin would affect his annual evaluation. He expressed his

concerns to Christensen. Christensen told Humphries that he would not consider the Cardin-originated discipline when evaluating Humphries' job performance. Humphries' annual review seemed to confirm what Christensen said, since he was given a satisfactory rating for the previous year's service (including the time in which he received the Employee Counseling Reports described above), was given a raise, and was thanked for his service by Christensen himself.

**ANSWER:**

Defendant admits that in or about October, 2001 Cardin returned to Defendant's Tinley, Park location and that Plaintiff's rate of compensation was increased effective November 1, 2001. Answering further, Defendant states that Plaintiff's performance reviews speak for themselves, and denies Plaintiff's characterization of the same. Defendant denies the remaining allegations in Paragraph 16.

17. In late November 2001, Humphries witnessed the termination of an African-American server, Venus Green. Green was fired by one of Humphries' fellow Associate General Managers, a white man named Joe Stennett. Stennett, had been "on loan" to the restaurant from the Tinley Park Cracker Barrel location at the same time that Cardin had been temporarily transferred from Tinley Park to serve as Acting General Manager. Not only was Green's termination based on an incorrect perception of the facts, it also occurred without adherence to Cracker Barrel's established procedures for a person with her level of service - procedures that had been

accorded to white employees under similar circumstances.

**ANSWER:**

Defendant admits that Venus Green, a server, was discharged by Associate Manager Joe Stinnett in November 2001, and that Stinnett was temporarily transferred to unit #221 from Defendant's Tinley Park location at approximately the same time that Cardin was temporarily transferred to serve as Acting General Manager. On information and belief, Defendant admits that Stinnett is white and Green is African-American. Defendant is without knowledge or information sufficient to form a belief as to the truth of Plaintiff's allegation that he witnessed Ms. Green's termination. Defendant denies the remaining allegations in Paragraph 17.

18. Humphries complained about what he considered a racially disparate and wrongful termination to Christensen. Christensen told Humphries disapprovingly that he was going "outside of management" for raising these concerns about Green's termination, but that Humphries should schedule a meeting with Ken Dowd, the new white General Manager of the Bradley location, and with Humphries' fellow Associate Manager, Stennett, on December 6, 2001.

**ANSWER:**

Defendant admits that Ken Dowd became General Manager of Defendant's unit #221 on or about November 1, 2001. On information and belief,

Defendant admits that Dowd is white. Defendant denies the remaining allegations in Paragraph 18.

19. On December 5, before the meeting could take place, Humphries was terminated. At first, he was simply told that the safe was found open on Monday morning and that his employment would be terminated. No details, violations of procedure, or counseling reports were provided at that time. When he pressed for details, approximately one week later, he was given an Employee Counseling Report which informed him that he had been terminated for leaving the safe door open several nights earlier. The Report revealed that his accuser was Stennett, the co-manager who had wrongfully terminated Green and who had been summoned to a meeting with the Plaintiff to discuss her termination. Stennett was the only witness to Humphries' alleged infraction. No loss was alleged to have occurred as a result.

**ANSWER:**

Defendant admits that: (1) Plaintiff's employment was terminated on December 5, 2001, (2) Plaintiff was told that the safe had been found open on the morning of December 3, 2001 and that his employment would be terminated, (3) Plaintiff was given an Employee Counseling Report, and (4) Stinnett had seen the safe open on the morning of December 3, 2001 and reported this to Defendant. Defendant states that the Employee Counseling Report speaks for itself, and denies Plaintiff's characterization of the same. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that Stinnett was the only witness to Plaintiff's infraction.

Defendant denies the remaining allegations in Paragraph 19.

20. Upset at an unproven allegation to which he had been given no opportunity to respond coming so closely upon the heels of his latest discussion with Christensen about racism at the restaurant, Humphries asked Christensen for a written explanation of the reason for his termination. Christensen wrote Humphries on December 12, informing him that he was terminated, not merely for leaving the safe open on December 2, 2001, but because in September 2001, Cardin had given him a "final written warning" about leaving the store door unchained.

**ANSWER:**

Defendant admits that Plaintiff asked Christensen for a written explanation of the reason for Plaintiff's termination, and that Christensen wrote a letter to Plaintiff dated December 12, 2001. Defendant states that Christensen's letter speaks for itself and denies Plaintiff's characterization of the same. Defendant denies the remaining allegations in Paragraph 20.

21. As a result of the Defendant's racially discriminatory actions, Humphries experienced severe emotional distress. He suffered financial hardship because he was the sole breadwinner for his family. In addition, Cracker Barrel deemed Humphries' termination as being "for cause" within the meaning of its ERISA plans, and denied him access to profit-sharing and pension benefits to which he otherwise

would have been entitled. He still has not recovered from these losses.

**ANSWER:**

Defendant denies the allegations in Paragraph 21.

**COUNT I**
**DISCRIMINATION ON THE BASIS OF RACE**
**IN VIOLATION OF 42 U.S.C. § 1981**
**AND TITLE VII**

22. The plaintiff restates and incorporates by reference Paragraphs 1-21 above as part of this Count of the Complaint.

**ANSWER:**

Defendant restates and incorporates by reference its answers to Paragraphs 1 through 21 as its answer to Paragraph 22.

23. Cracker Barrel has discriminated against the Plaintiff with regard to discipline and termination because of race, in violation of the Civil Rights Act of 1866, 42 U.S.C. §1981, as amended, and in violation of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, as amended.

**ANSWER:**

Defendant denies the allegations in Paragraph 23.

24. Cracker Barrel's conduct, as described above, was intentional, deliberate, reckless, willful and conducted with disregard of the rights of Plaintiff.

**ANSWER:**

Defendant denies the allegations in Paragraph 24.

25. By reason of International's [sic] discriminatory employment practices, the Plaintiff has experienced extreme harm, including loss of compensation, wages, back and front pay, and other employment benefits and, as such, is entitled to all legal and equitable remedies, available under Title VII, as amended, and section 1981, as amended, including compensatory and punitive damages.

**ANSWER:**

Defendant denies the allegations in Paragraph 25.

**COUNT II**
**RETALIATION IN VIOLATION**
**OF SECTION 1981 AND TITLE VII**

26. The plaintiff restates and incorporates by reference Paragraphs 1-25 above as part of this Count of the Complaint.

**ANSWER:**

Defendant restates and incorporates by reference its answers to Paragraphs 1 through 25 as its answer to Paragraph 26.

27. Cracker Barrel has retaliated against the Plaintiff with regard to discipline and termination, in violation of 42 U.S.C. § 2000e-3 and 42 U.S.C. § 1981, as amended.

**ANSWER:**

Defendant denies the allegations in Paragraph 27.

28. Cracker Barrel's conduct, as described above, was intentional, deliberate, reckless, willful and conducted with disregard of the rights of Plaintiff.

**ANSWER:**

Defendant denies the allegations in Paragraph 28.

29. By reason of Cracker Barrel's discriminatory employment practices, the Plaintiff has experienced extreme harm, including loss of compensation, wages, back and front pay, emotional distress, anger, and other employment benefits and, as such, is entitled to all legal and equitable remedies available, under Title VII as amended and under section 1981, as amended, including compensatory and punitive damages.

**ANSWER:**

Defendant denies the allegations in Paragraph 29.

## RESPONSE TO RELIEF REQUESTED

WHEREFORE, Defendant denies Plaintiff has sustained any damages as a result of Defendant's alleged acts or omissions, denies it is indebted to

Plaintiff in any manner whatsoever, and requests that the Court enter judgment in its favor and against Plaintiff, including awarding Defendant its costs and attorneys' fees.

## DEFENDANT'S ADDITIONAL DEFENSES

### FIRST ADDITIONAL DEFENSE

Plaintiff's First Amended Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

### SECOND ADDITIONAL DEFENSE

Plaintiff did not bring this action within ninety days after his receipt of a Notice of Right to Sue from the Equal Employment Opportunity Commission. His claims under Title VII of the Civil Rights Act of 1964 are therefore barred by 42 U.S.C. § 2000e-5(f)(1).

### THIRD ADDITIONAL DEFENSE

To the extent Plaintiff's claims under Title VII of the Civil Rights Act of 1964 were not specifically included in Plaintiff's Charge of Discrimination filed with the Equal Employment Opportunity Commission and/or Illinois Department of Human Rights, such claims are barred by Plaintiff's failure to exhaust his administrative remedies.

FOURTH ADDITIONAL DEFENSE

Plaintiff's claims under Title VII are barred to the extent that they seek relief available to Plaintiff under 42 U.S.C. § 1981.

FIFTH ADDITIONAL DEFENSE

Plaintiff's claims are barred, in whole or in part, by the applicable statutes of limitations.

SIXTH ADDITIONAL DEFENSE

On information and belief, Plaintiff has failed to mitigate any damages purportedly due him by failing to be available for work, failing to actively and earnestly search for work, and forgoing wages and benefits which he could have earned with the exercise of reasonable diligence.

SEVENTH ADDITIONAL DEFENSE

Plaintiff's First Amended Complaint does not state facts sufficient to plead willful conduct or to recover liquidated or punitive damages. All alleged actions by Defendant with respect to Plaintiff were based upon legitimate, non-discriminatory reasons and no unlawful factor motivated Defendant in any decisionmaking regarding Plaintiff's employment.

Respectfully submitted,

CBOCS WEST, INC.

By: /s/_____
One of its Attorneys

John F. Kuenstler
Beau C. Sefton
William R. Pokorny
Wildman, Harrold, Allen & Dixon LLP
225 W. Wacker Drive
Chicago, Illinois 60606-1229
Tel: (312) 201-2000
Fax: (312) 201-2555

**United States District Court**
**Northern District of Illinois**

**Name of Assigned Judge or Magistrate Judge**
Charles P. Kocoras

| **CASE NUMBER** | **DATE** |
|---|---|
| 03 C 3765 | 11/1/2004 |

**CASE TITLE** Humphries vs. CBOCS West, Inc.

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

* * *

DOCKET ENTRY:

* * *

(10) ☒ [Other docket entry] **ENTER MEMORANDUM OPINION:** We grant Cracker Barrel's motion (Doc 33-1) to dismiss Humphries' claims under Title VII, with prejudice, on the basis that his Title VII claims were untimely filed. Status hearing and close of discovery set for February 22, 2005 to stand.

(11) ☒ [For further detail see order attached to the original minute order.]

✓ Docketing to mail notices.

SCT courtroom deputy's initials
Date/time received in central Clerk's Office
2004 OCT 02 AM 9:22
U.S. DISTRICT COURT

date docketed NOV 01 2004

docketing deputy initials GMA

Document Number 38

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

**03 C 3765**

**[Filed November 1, 2004]**

| | |
|---|---|
| HEDRICK G. HUMPHRIES, | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| CBOCS WEST, INC., | ) |
| Defendant. | ) |
| | ) |

## MEMORANDUM OPINION

CHARLES P. KOCORAS, Chief District Judge:

This is an employment discrimination case brought Plaintiff, Hedrick Humphries ("Humphries"), pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* and 42 U.S.C. § 1981. Defendant, CBOCS West, Inc. ("Cracker Barrel"), has moved to dismiss Humphries' Title VII claims of the complaint, with prejudice, on the basis that they were untimely filed. For the reasons set forth below, the motion to dismiss is granted.

## BACKGROUND

Humphries had been employed at Cracker Barrel Restaurant for three years as an associate manager.

Upon termination from Cracker Barrel, in December of 2001, he filed a two-count discrimination claim with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination on the basis of race and retaliation in violation of the Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 *et seq.* and 42 U.S.C. § 1981.

In turn the EEOC, dismissing Humphries' complaint, issued him a Notice of Right to Sue on March 3, 2003. The notice informed Humphries that if he wanted to commence a civil action, he was required to file a complaint with the court within 90 days of his receipt of the notice. Accordingly, Humphries had until June 5, 2003 to file the complaint.

On June 2, 2003, three days prior to the expiration of the 90-day statutory period, Humphries filed the lawsuit, along with a motion for the appointment of counsel and an application for leave to proceed *In Forma Pauperis* ("IFP"). On June 25, 2003, we denied Humphries' IFP application on the basis that, first, his income was above the poverty threshold level and, second, the petition lacked other pertinent information necessary to make a determination as to his financial circumstances.

Subsequently, Humphries amended the IFP application to include the missing financial information and resubmitted the request to this court on October 14, 2003. Denying the amended application on October 22, 2003, we determined that Humphries was not indigent and, therefore, was ineligible to proceed IFP.

Following the second denial, Humphries, again amended the IFP application and submitted it to this court on December 2, 2003. Upon reviewing the third request, we denied the petition and ordered him to pay the filing fee. On January 12, 2004, 195 days beyond the 90-day statutory limitations period, Humphries paid the filing fee.

The legal issue before this court is whether Humphries' complaint was timely "filed" within the meaning of 42 U.S.C. § 2000e-5(f)(1), since the filing fees were paid outside of the 90-day statute of limitations period.

## DISCUSSION

Cracker Barrel contends that since Humphries paid the filing fees 184 days after the expiration of the 90-day statute of limitations period, Humphries' complaint was untimely filed under 42 U.S.C. § 2000e-5(f)(1). Thereby, pursuant to the Federal Rules of Procedure Rule 12(b)(6), defendant has moved to dismiss the complaint, "for failure to state a claim upon which relief can be granted". Fed. R. Civ. P. 12(b)(6).

In determining whether to grant a 12(b)(6) motion to dismiss, the Court will accept "the well-plead allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff." *Hentosh v. Herman M. Finch University of Health Sciences* 167 F.3d 1170, 1173 (7th Cir. 1999). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King*

*& Spalding,* 467 U.S. 69, 73 (1984). "We view the facts in the complaint in the light most favorable to the non-moving party." *Hentosh,* 167 F.3d at 1173.

42 U.S.C. § 2000e-5(f)(1) requires that a plaintiff must file a civil action within 90 days of receiving the EEOC Notice of the Right to Sue. A "civil action is *commenced by* filing a complaint with the court." Fed. R. Civ. P. 3. *Emphasis added.* According to the Northern District of Illinois Local Rules, a complaint is "filed" when the complaint, accompanied with the appropriate filing fee, is submitted to the clerk. Local Rule 3.3. However, a court "may authorize the commencement . . . of any suit . . . without prepayment of fees and costs" if the plaintiff is unable to pay. 28 U.S.C. § 1915(a); *see Williams-Guise v. Board of Education of the City of Chicago,* 45 F.3d 161, 162 (7th Cir. 1995). Where the plaintiff is unable to pay the filing fee, he may submit a petition to the court to proceed IFP. If the judge approves the IFP petition, the complaint is deemed "filed" either on the date of the judge's order or on date the complaint and IFP petition was placed in custody of the clerk. Local Rule 3.3; *see Williams-Guise,* 45 F.3d 161, 162 (7th Cir. 1995); *Stephenson v. CNA Financial Corporation,* 777 F. Supp. 596, 589 (N.D. Ill. 1991); *Quiles v. O'Hare Hilton,* 572 F. Supp. 866, 867 (N.D. Ill. 1983).

However, in cases where the judge rejects an IFP petition, the complaint is not deemed "filed" until the date the filing fees are paid. *Williams-Guise,* 45 F.3d 161 at 162; *Robinson v. America's Best Contacts and Eyeglasses,* 876 F.2d 596, 597 (7th Cir. 1989). For purposes of the statute of limitations, when an IFP petition is submitted to the clerk, the court will

temporarily suspend or toll the limitations period while the court determines whether to grant or deny the IFP petition. However, the limitations period resumes running upon the date the plaintiff receives notification of the denial. *Williams-Guise v. Board of Education of the City of Chicago,* 45 F.3d 161, 162 (7th Cir. 1995); *Triplett v. Midwest Wrecking Co.,* 155 F. Supp. 2d 932, 935 (N.D. Ill. 2001); *see Jarrett v. U.S. Sprint Communications Co.,* 22 F.3d 256, 259 (10th Cir. 1994).

In the instant case, Humphries received the Notice of the Right to File on March 6, 2003. The notice provided that in order to file a civil action, Humphries must file suit within 90 days, or by June 5, 2003. Accordingly, Humphries timely submitted his complaint and his first IFP petition on June 2, 2003, three days before the expiration of the 90-day statute of limitations filing period. In a minute order, dated June 25, 2003, we denied Humphries' IFP petition.

Accordingly, the 90-day statute of limitations tolled during the processing of the petition, but resumed running upon Humphries' notification of the denial. Since the date upon which he was notified of the denial cannot be determined from Humphries' complaint, this court will include three days for service by mail pursuant to Fed. R. Civ. P. 6(e). *Truitt v. County of Wayne,* 961 F. Supp. 181, 183 (E.D. Mich. 1997). Therefore, the statute of limitations resumed running on June 28, 2003, which left Humphries three days to file his complaint before the expiration of the 90-day statutory period. In other words, Humphries had until July 1, 2003 to pay his filing fee, thereby "filing" his complaint with the court. Humphries, however, did not

pay the filing fee until January 12, 2004, 187 days after the expiration of the 90-day statute of limitations period. Therefore, Humphries' complaint was not timely "filed" in accordance with 42 U.S.C. § 2000(e)-(f)(5).

More importantly, while the court on three separate occasions denied Humphries' IFP petition, it never granted Humphries an extension of time in which to either pay the filing fee or to submit an amended IFP petition. Where the court grants a complainant an extension of time to pay the filing fee, a complaint can be held as timely even though the filing fee was paid beyond the 90-day statutory period. *See Robinson v. America's Best Contacts and Eyeglasses,* 876 F.2d 596, 598 (7th Cir. 1989) (complaint held as timely since filing fee was paid within a court approved 90-day extension of the Title VII limitations period); *Triplett v. Midwest Wrecking Company,* 155 F. Supp. 2d 932, 936 (N.D. Ill. 2001) (complaint held as timely since filing fee was paid within a court approved 10 day extension of the Title VII limitations period); *United States ex. rel. Cardenas v. Detella,* No. 97 C 3005, 1998 U.S. Dist. LEXIS 15920, at *3 (N.D. Ill. Sept. 24, 1998) (complaint held as timely since filing fee was paid within court approved 25 day extension of the habeas corpus limitations period).

Further, in absence of a court order granting an extension of time in which to pay a filing fee, a complaint can be deemed "timely" filed if the filing fee is paid within 15 days of the notification of the denial of the IFP petition. Local Rules 3.3(e); *see Chatman v. Condell Medical Center, et al.,* No. 99 C 5603, 2001

U.S. Dist. LEXIS 11369, at *13 (N.D. Ill. Aug. 2, 2001) (complaint was held timely because the filing fee was paid 10 days after notification of the IFP petition denial). Therefore, in order for Humphries to have filed a timely complaint, the filing fee had to either be paid prior to the expiration of the 90-day filing period or 15 days after notification of the first IFP petition in accordance with Local Rule 3.3(e).

It should be noted that there are exceptions to the Title VII 90-day filing requirement prescribed in 42 U.S.C. § 2000(e)-(f)(5). While the 90-day time limit is not a "jurisdictional prerequisite to filing a Title VII lawsuit, but rather, is more akin to a statute of limitations and subject to waiver, estoppel, and equitable tolling under appropriate circumstances." *Hentosh v. Herman M. Finch University of Health Sciences,* 167 F.3d 1170, 1174 (7th Cir. 1999); *see Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393 (1982).

One exception is the doctrine of equitable estoppel, sometimes referred to as fraudulent concealment. Under this doctrine, a limitations period is suspended when "defendant takes active steps to prevent the plaintiff from suing in time, such as by hiding evidence or promising not to plead the statue of limitations." *Hentosh,* 167 F.3d at 1174. Since Humphries' complaint neither alleges nor provides a basis to infer that defendant purposely hindered Humphries' ability to file a timely complaint, equitable estoppel is not applicable in this case.

A second exception is equitable tolling. This doctrine permits a plaintiff to avoid the bar of the statute of limitations if, despite all due diligence, he is

unable to obtain vital information bearing on the existence of his claim. *Id.* at 1174. "Equitable tolling should be exercised only sparingly and not in cases where claimant failed to exercise his due diligence in preserving his legal rights." *Knight v. City of Milwaukee,* No. 98-2510, 1998 WL 846857, at *2 (7th Cir. Nov. 25, 1998). Similarly, Humphries' complaint neither alleges nor provides a basis to infer that his untimely filling of his complaint was due to his inability to obtain information that was essential to establishing his claim. Therefore, the doctrine of equitable tolling cannot be applied in this case to bar the 90-day statute of limitations requirement.

Humphries asserts that in the Seventh Circuit, once the court denies an IFP petition, the complainant has a "reasonable" amount of time in which to pay the filing fee. Relying on *Williams-Guice v. Board of Education,* 45 F.3d 161 (7th Cir. 1995), Humphries contends that his Title VII complaint should not be dismissed as untimely because the fee was paid within a reasonable time after the *third* IFP petition was denied. The fact that Humphries paid the filing fee 35 days after the date of the third IFP petition denial is irrelevant. While reasonableness may be a factor into the inquiry as to whether a complaint that has been filed outside of the 90-day statute of limitation period is timely, the Seventh Circuit has not established reasonableness as the controlling standard of analysis.

In *Williams-Guice,* the Court discussed a hypothetical fact pattern that is similar to this case and raised the very question on which this case turns: "What happens when the plaintiff lodges the complaint and application to proceed IFP with two days to go [on

the statute of limitations clock and does not learn about the judge's order denying the complaint until the time has run?" *Id.* at 165. However, the *Williams-Guice* Court left this question unanswered and instead, gave two potential solutions, one being that the "time remains in suspension for a *"reasonable* time". *Id. Emphasis added.* Since *Williams-Guice, the* Seventh Circuit has yet to resolve this issue. Additionally, since the issue in *Williams-Guise* involved the timeliness of service of process and not the timeliness of the filing of a complaint, the discussion of a possible "reasonableness test" is dicta, and, therefore, not controlling. Thus, Humphries' assertion that the complaint was timely filed because the filing fee was paid within a "reasonable" amount of time after the third denial of the IFP petition is misguided.

Even if this court was persuaded to use a "reasonableness test" to determine whether Humphries had timely filed his complaint, he would not have satisfied that standard. The court denied the first IFP petition on June 25, 2003. Even allowing three days for mail service, Humphries was notified of the denial on June 28, 2003 and yet did not submit an amended IFP petition until October 14, 2003, 118 days after notification of the denial. Moreover, we denied the second IFP petition on October 22, 2003. Again, allowing three days for mail service, Humphries was notified of the denial on October 25, 2003 but did not submit the third petition until December 2, 2003, 38 days later after notification of the denial. Finally, we denied the third petition on December 8, 2003 and the filing fee was paid on January 14, 2004. Adding three days for mail service, the fees were not paid until 32

days after notification of the denial of the third petition. Taking into account three days for mail service and the three days that were remaining on the statute of limitations clock when Humphries received notification of the denial of the first IFP petition, he had until July 1, 2003, the end of the limitations period, to file a timely complaint.

Therefore, Humphries did not pay the filing fee until 195 days after the expiration of the 90-day statute of limitations period. Accepting the 195 days as reasonable would be inconsistent with the rationale for the 90-day statute of limitations for Title VII discrimination cases.

Congress has expressed the limitations bar not in months or years, but in days. It requires . . . the court complaint to be filed within 90 days after the receipt of the EEOC "right to sue" letter. 42 U.S.C. § 2000e-5(e)(1). Implicit in this legislation is a policy that there should be no delay in employment discrimination cases. It is a recognition that memories may fail in the workplace in recalling the minutia of what is said and what was done. It therefore becomes necessary to hear testimony while precise recollections are keen and are not dulled by undue passage of time. *Sanders v. Venture Stores, Inc.* 56 F.3d 771, 775 (7th Cir. 1995). Therefore, it is clear that the time period of 195 days greatly undermines the purpose of the statute of limitation guidelines.

## CONCLUSION

For the foregoing reasons we grant Cracker Barrel's motion to dismiss Humphries' claims under Title VII,

with prejudice, on the basis that his Title VII claims were untimely filed.

/s/
Charles P. Kocoras
Chief Judge
United States District Court

Dated: NOV 1 2004

JA 93

Exhibit P to LOCAL RULE 56.1
Statement of Material Facts by Plaintiff

Docket Entry 53, filed 6/28/05
Bates Numbers CB00460 - CB00473

[see Fold-out Exhibit, CB000460-CB00465]

balance of document begins at JA 94

Open Door Policy

CONFIDENTIAL

Open-Door Report - FOR COMPANY USE ONLY - pub. 081799

# pleasing people

Employee Open-Door Report

| | | | |
|---|---|---|---|
| Date of Report: | | Date Resolved: | |
| Follow-Up Date (if required): | | | |
| Follow-Up completed by: | | | |
| | Manager Name | | Manager Signature |
| Incident Closed Date: | | Closed by: | |
| | | | Manager Signature |

General Instructions & Guidelines for Reporting Manager

| | |
|---|---|
| 1. | This form is to be completed by a member of the store management team or District Manager. |
| 2. | This form must be completed within 10 days of report of the incident. |
| 3. | All information must be completed and appropriate signatures gathered. |
| 4. | An incident report should be completed for any situation brought to your attention regarding discrimination or harassment of any kind. Review the policies on the back of this form. Cracker Barrel will not tolerate any form of discrimination, harassment or retaliation of its employees due to race, color, religion, gender, national origin, marital status, or any medical condition or disability. |

CB00460

http://notes1/operations/manuals/ops.../5e56b875883?a9bf8625609be005e6226?OpenDocumen... 8/13/01

BEST AVAILABLE COPY

| | |
|---|---|
| 5. | Use the standard forms provided to gather employee statements. Make sure you have any witnesses to the incident complete a statement. Should you require them, you can make additional copies of the blank Employee Statement Form. The employee is to complete, sign and date the report. Should the employee request you to complete the form for them, you must sign the "Prepared By" section of the form and you must have the employee sign and date the form. |
| 6. | Incident conclusion with proposed remedial action and follow-up dates must be completed. |
| 7. | Any counseling action taken as a result of this incident requires that you complete a Employee Counseling Report. Remember that the employee is to receive a copy of the Employee Counseling Report only. |
| 8. | It is important that you remind employees that have brought an incident to your attention that they will not be retaliated against, and that their statements will be kept as confidential as necessary to the investigation. |
| 9. | A copy of Cracker Barrel's policies on Equal Employment Opportunities, Open-Door, and Harassment should be reviewed with each employee involved in this incident. Copies of these policies have been provided with a receipt for employees to sign. Attach the signed receipt to this report. |
| 10. | You must submit this form via Inter-Office Mail to the Employee Relations department at the Home Office where it will be reviewed by your Employee Relations Specialist . If you have any questions or concerns in completing any of these forms or conducting the investigation, please call your Employee Relations Specialist at the Home Office. |

Cracker Barrel Old Country Store, Inc.
Confidential Employee Statement Form

| | | | | |
|---|---|---|---|---|
| Store No: | | Today's Date: | | |
| Employee Name: | | Employee Social Security Number: | | |
| Employee Position: | | Employee PAR Level: | | |
| Incident Date: | | (to the best of your knowledge) | | |
| In your own words, please describe the incident including specific dates and times (attach additional page if necessary): | | | | |

| | | | | |
|---|---|---|---|---|
| Were there any witnesses to this incident? If so, who? | | | CONFIDENTIAL | |
| | Statements will be kept as confidential as necessary to the investigation | | | |
| Signed: | | | | |
| | Employee Signature | | Date | |
| Prepared by: | | | | |
| | Print Name | | Date | |
| Preparer's Signature: | | | | |
| For Management Use Only | | | | |
| Reported to District Manager | Date: | | Reported to Home Office Date: | |
| For Home Office Use Only | | | | |
| Date Received: | | Reviewed by: | | |
| | | | Employee Relations Dept. | Cracker Barrel Old Country Store, Inc. |

Declaración Confidencial del Empleado

| | | | | |
|---|---|---|---|---|
| Número de tienda: | | Fecha: | | |
| Nombre de empleado: | | Número de Social Security: | | |
| Puesto de empleado: | | PAR Nivel de empleado: | | |
| Fecha de incidente: | | (según mi leal saber y entender) | | |

CB00462

| | | | | |
|---|---|---|---|---|
| Por favor describa en sus propias palabras, el incidente incluyendo fechas y horarios. Use más páginas si se necesita.<br><br>¿Hubo testigos de este incidente? ¿Si hubo, quien? | | | CONFIDENTIAL | |
| | Esta declaración se mantendra tan confidencial como sea posible durante la investigación. | | | |
| Firma del empleado: | | | | |
| | Firma del empleado | | Fecha | |
| Prepared by: | | | | |
| | Print Name | | Date Prepared | |
| Preparer's Signature: | | | | |
| For Management Use Only | | | | |
| Reported to District Manager | Date: | | Reported to Home Office Date: | |
| For Home Office Use Only | | | | |
| Date Received: | | Reviewed by: | | |

CB00463

CONFIDENTIAL

| | | | | |
|---|---|---|---|---|
| | | | Employee Relations Dept. | |

Incident Information

*To be completed by management.*

| | | | | |
|---|---|---|---|---|
| Store No.: | | | Today's Date: | |
| Completed By: | | | | |
| | Print Name | | Signature | |
| Incident Reported By: | | | | |
| | Name | | Position | PAR Level |
| Date of Incident: | | | Time of Incident: | Date Incident Reported: |
| Describe place where incident happened: | | | | |
| Describe the details of the incident including specific dates and times: | | | | |
| Parties involved: | Name | Position | PAR Level | |
| Witnesses to the incident: | | | | |
| | Name | Position | PAR Level | |
| List any person (s) that were told of the incident, including Managers: | | | | |
| | Name | Position | Date Informed of Incident | |

CB00464

Incident Resolution CONFIDENTIAL

For each person involved in the incident, list action taken with each.
For counseling, a separate Counseling Report must also be completed.

| Name | Date Action Taken: | Action: |
|---|---|---|
| | ____/____/____ | Policy Review<br>Counseled/Verbal Warning<br>Counseled/Written Warning<br>Counseled/Final Written Warning<br>Suspension during investigation From:_____<br>To: _____<br>Termination Effective:_____ |
| Comments and/ Follow-Up Action to take place: | | |
| Manager Signature: | | Date: |
| Name | Date Action Taken: | Action: |
| | ____/____/____ | Policy Review<br>Counseled/Verbal Warning<br>Counseled/Written Warning<br>Counseled/Final Written Warning<br>Suspension during investigation From:_____ To: _____<br>Termination Effective:_____ |
| Comments and/or Follow-Up Action to take place: | | |
| Manager Signature: | | Date: |
| Name | Date Action Taken: | Action: |
| | ____/____/____ | Policy Review<br>Counseled/Verbal Warning<br>Counseled/Written Warning<br>Counseled/Final Written Warning<br>Suspension during investigation From:_____ To: _____<br>Termination Effective:_____ |
| Comments and/or Follow-Up Action to take place: | | |
| Manager Signature: | | Date: |

CB00465

☐ Contact has been made to the proper authorities (including Police if appropriate).

[CB00466]

CONFIDENTIAL

Describe:

_____

☐ District Manager contacted DM Name:_____

Date:_____

Contacted by (print name):_____

Date:_____

☐ Home Office contacted Name:_____

Contacted by (print name):_____

[LOGO]

Equal Employment Opportunity Statement

Employment opportunities at Cracker Barrel are open to all qualified applicants solely on the basis of their experience, aptitude, and abilities. Qualified applicants are considered for all positions and for advancement without regard to race, color, religion, sex, national origin, age, marital status, or the presence of a disability, in accordance with federal law. Cracker Barrel also complies with State and local law regarding equal employment opportunity. Advancement is based on an individual's achievement, performance, ability, attitude, and potential for promotion.

Cracker Barrel will not tolerate any form of discrimination, harassment or retaliation of its employees due to race, color, religion, sex, national origin, marital status, or any medical condition or disability.

- Employees who believe they have been subjected to unlawful discrimination, harassment or retaliation must immediately advise their Manager, Supervisor or the Employee Relations department toll free at (888) 648-3667.
- If appropriate or necessary, an investigation will be conducted and confirmed cases of discrimination and/or harassment will be subject to discipline, up to and including, termination.
- The results of an investigation will be communicated to the employee who has made the claims of discrimination. The employee will be notified that an investigation has occurred and the appropriate action has been taken. This will be done either verbally or in writing.
- All confirmed cases of discrimination will be promptly remedied and the offender appropriately disciplined.

[CB00467]

- Employees can and will sometimes provide notice of harassment or discrimination to someone other than their immediate supervisor. These instances should also be addressed immediately. While the above policy primarily addresses hiring of qualified applicants, it should also apply to all personnel decisions. Our Equal Opportunity statement should extend to promotions, developmental opportunities, transfers, disciplinary actions, etc.

Harassment Policy

Cracker Barrel Old Country Store, Inc. does not tolerate harassment in any form. The company values and respects all employees.

- All employees are responsible for ensuring the workplace is free from harassment.
- Inappropriate or offensive behavior, actions, words, jokes, or comments based on an individual's sex, race, ethnicity, age, disability, religion, or any other legally protected characteristic will not be tolerated and may constitute harassment.
- Cracker Barrel will take affirmative steps to end any such conduct.
- Employees must avoid any action or conduct which could be viewed as harassment, including but not limited to:
- Sexual touching, advances or propositions.
- Verbal abuse of a sexual or racial nature.
- Graphic or suggestive comments about an individual's dress or body.
- Sexually or racially degrading words to describe an individual.
- Display in the workplace of sexually suggestive or racially offensive objects or pictures.
- Sexually or racially offensive jokes.
- All complaints of harassment at work by anyone, including managers, co-workers, or guests, must be reported to the manager or supervisor or to the Employee Relations department toll free at (888) 648-3667.
- All complaints will be investigated in a timely manner and kept strictly confidential.
- Confirmed cases of harassment will be regarded as gross misconduct and appropriate disciplinary action will be taken.

Discipline that puts an end to the harassing behavior is appropriate. Some circumstances may warrant termination. In other instances, counseling may be appropriate. Please contact the Employee Relations department for assistance.

Open Door Policy:

Employees are encouraged to go to their manager or supervisor with any questions or suggestions, or to review any problems or decisions affecting their jobs. The manager or supervisor is the employee's first link to the rest of the company.

- The Cracker Barrel manager or supervisor is responsible for the employee and wants him or her to do well, and so is interested in his or her welfare, work, working conditions, and satisfaction as an employee of Cracker Barrel.
- Supervisors and department heads are responsible for creating and maintaining a positive, productive working environment free from harassment and discrimination.
- Any employee who believes he or she is the victim of discrimination, harassment, or retaliation must report this behavior to their manager immediately.
- If the employee believes the situation has not been resolved or if he or she just cannot talk about it with his or her manager, it is appropriate to speak with the manager's direct supervisor.
- If the employee believes the problem or concern has still not been resolved, write or call the Employee Relations department toll free at (888) 648-3667.
- The employee will not get into trouble or be retaliated against by using this policy in good faith.

- It is everyone's responsibility to help maintain good working relationships to continue to communicate until the problem is finally resolved.
- Cracker Barrel pleases its employees by supporting them as they strive for success and by listening to their concerns and ideas.

[CB00468]

- Cracker Barrel relies on managers and supervisors to do this as part of their jobs. For this reason, it is mandatory for the manager or supervisor to investigate any allegations of inappropriate behavior immediately.
- The Employee Relations department is available to assist with any questions or concerns that arise from such a situation.

[LOGO]

Equal Employment Opportunity Statement

Employment opportunities at Cracker Barrel are open to all qualified applicants solely on the basis of their experience, aptitude, and abilities. Qualified applicants are considered for all positions and for advancement without regard to race, color, religion, sex, national origin, age, marital status, or the presence of a disability, in accordance with federal law. Cracker Barrel also complies with State and local law regarding equal employment opportunity. Advancement is based on an individual's achievement, performance, ability, attitude, and potential for promotion.

Cracker Barrel will not tolerate any form of discrimination, harassment or retaliation of its

employees due to race, color, religion, sex, national origin, marital status, or any medical condition or disability. Employees who believe they have been subjected to unlawful discrimination, harassment or retaliation must immediately advise their Manager, Supervisor or the Employee Relations department toll free at (888) 648-3667.

Harassment Policy

Cracker Barrel Old Country Store, Inc. does not tolerate harassment in any form. The company values and respects all employees. All employees are responsible for ensuring the workplace is free from harassment. Inappropriate or offensive behavior, actions, words, jokes, or comments based on an individual's sex, race, ethnicity, age, disability, religion, or any other legally protected characteristic will not be tolerated and may constitute harassment. Cracker Barrel will take affirmative steps to end any such conduct.

Employees must avoid any action or conduct which could be viewed as harassment, including but not limited to:

- Sexual touching, advances or propositions.
- Verbal abuse of a sexual or racial nature.
- Graphic or suggestive comments about an individual's dress or body.
- Sexually or racially degrading words to describe an individual.
- Display in the workplace of sexually suggestive or racially offensive objects or pictures.

[CB00469]

- Sexually or racially offensive jokes.

All complaints of harassment at work by anyone, including managers, co-workers, or guests, must be reported to the manager or supervisor or to the Employee Relations department toll free at (888) 648-3667. All complaints will be investigated in a timely manner and kept strictly confidential. Confirmed cases of harassment will be regarded as gross misconduct and appropriate disciplinary action will be taken.

Open Door Policy:

As an employee of Cracker Barrel Old Country Store, Inc. you belong to an important group of people. Cracker Barrel pleases its employees by supporting them as they strive for success and by listening to their concerns and ideas. Cracker Barrel relies on store managers to do this as part of their jobs.

Your manager is responsible for your training. He or she wants you to do well, and is interested in your welfare, your work, your working conditions, and your satisfaction as an employee of Cracker Barrel. We encourage you to go to your manager with any questions or suggestions, or to review any problems or decisions affecting your job. Your manager is your first link to the rest of the company. If you then believe the situation has not been resolved or if you just can't talk about it with your manager, write or call your District Manager. If you believe your problem or concern has still not been resolved write or call the Employee Relations Department toll free at (888) 648-3667.

Please know that you won't be retaliated against by using this policy in good faith. Cracker Barrel always tries to have a good working atmosphere. Of course, there will be occasions when problems need to be discussed so that solutions can be reached. It is everyone's responsibility to help maintain good

working relationships and to continue to communicate until the problem is finally resolved.

| Manager:<br><br>1. Review policies with employee.<br>2. Have employee sign statement below.<br>3. Tear off the signature portion to be attached to incident report.<br>4. Hand employee upper portion with policy statements for their own records. |
|---|
| By signing this statement I verify that I have reviewed with my manager and received a copy of Cracker Barrel Old Country Store's Equal Employment Opportunity Statement, Harassment Policy and Open Door Policy.<br><br>Employee Signature:_____<br>Today's Date:_____ |

[LOGO]

[CB00470]

Declaración de la igualdad en el empleo

Las oportunidades de empleo en Cracker Barrel Old Country Store están abiertas a todos los aspirantes cualificados sólo basados en su experiencia, aptitud, y capacidades.

Los aspirantes cualificados (los empleados actuales y los empleados futuros del Cracker Barrel) se consideran para todas las posiciones y para el adelanto sin ninguna consideración hacia la raza, el color, la

religión, el sexo, el origen nacional, la edad, el estado civil, o la presencia de una incapacidad, de acuerdo con la ley federal.
Cracker Barrel también acata las leyes locales y del estado con respecto a la igualdad de oportunidades en el empleo.
El adelanto se basa enteramente en el logro, el funcionamiento, la capacidad, la actitud y el potencial de un individuo para la promoción.
Cracker Barrel no tolerará ninguna forma de discriminación o de hostigamiento de sus empleados debido a la raza, al color, a la religión, al sexo, al origen nacional, a la edad, al estado civil, o a ninguna condición o incapacidad médica.
Cualquier empleado que se crea víctima de la discriminación ilegal, el hostigamiento, o la represalia debe avisar inmediatamente a su gerente, el gerente de distrito, al Supervisor, o el Departamento de las Relaciones del Empleado en la Oficina Principal (888) 648-3667.

Política del hostigamiento
Cracker Barrel Old Country Store no tolera el hostigamiento en ninguna forma.
Valoramos y respetamos a todos nuestros empleados, y todos los empleados son responsables de asegurar que el lugar de trabajo esté libre del hostigamiento.
El comportamiento, las acciones, las palabras, las bromas, o los comentarios no apropiados u ofensivos, basados en el sexo de un individuo, la raza, la pertenencia étnica, la edad, la incapacidad, la religión, u otra característica legalmente protegida, no serán tolerados y pueden ser constituidos como el hostigamiento.

Sea consciente de que el Cracker Barrel tomará medidas afirmativas para acabar tal conducta.
Usted debe evitar cualquier acción o conducta que se podría ver como hostigamiento, incluyendo pero no limitado a:

- Tacto, avances o asuntos sexuales.
- Abuso verbal de una manera sexual o racial.
- Comentarios gráficos o sugestivos sobre la ropa o el cuerpo de un individuo.
- El uso de palabras sexuales o raciales degradantes al describir negativamente a un individuo.
- Exhibir en el lugar de empleo cualesquiera objetos o cuadros sexualmente sugestivos o racialmente ofensivos.
- Bromas sexualmente o racialmente ofensivas.

Si usted tiene una queja del hostigamiento en el trabajo contra cualquier persona, incluyendo gerentes, de los compañeros de trabajo o de los clientes, usted debe reportar la queja. Reporte su queja a su gerente o al departamento de Relaciones del Empleado (888) 648-3667. Todas las quejas serán investigadas de una manera oportuna y mantenidas estrictamente confidenciales.
Los casos confirmados de hostigamiento serán considerados como mala conducta grave y se tomará la acción disciplinaria apropiada.

<u>La politica "puerta abierta"</u>
Como empleado de Cracker Barrel Old Country Store, usted pertenece a un grupo de gente importante. El Cracker Barrel complace a sus empleados por apoyarlos mientras que se esfuerzan

[CB00471]

por el éxito y por escuchar sus preocupaciones e ideas. El Cracker Barrel depende de sus gerentes para hacer esto como parte de su trabajo.

Su gerente es responsable para su entrenamiento. Él o ella quiere que usted prospere y está interesado en su bienestar, su trabajo, sus condiciones de trabajo, y su satisfacción como empleado del Cracker Barrel. Le exhortamos que vaya a su gerente con cualquiera pregunta o sugerencia, o para repasar cualquier problema o decisión que afecte su trabajo.

Su gerente es su primera conexión al resto de la compañía. Entonces si usted cree que la situación no se haya resuelto o si usted no pueda discutirla con su gerente, es apropiado para hablar con el supervisor directo de su gerente (etcétera).

Si usted cree que su problema o preocupación todavía no se haya resuelto, escribe o llame al Departamento de Las Relaciones del Empleado (888) 648-3667.

Queremos que sepa que no sufrirá ningún problema usando esta política en la buena fe.

Cracker Barrel siempre intenta tener un buen ambiente de empleo. Por supuesto, habrá ocasiones cuando los problemas necesitan ser discutidos para poder alcanzar soluciones. Es la responsabilidad de cada persona de ayudar a mantener buenas relaciones en el trabajo y a seguir comunicándose hasta que el problema finalmente se resuelva.

| Manager:<br><br>1. Review policies with employee.<br>2. Have employee sign statement below.<br>3. Tear off the signature portion to be attached to incident report.<br>4. Hand employee upper portion with policy statements for their own records. |
|---|
| Certifico que he repasado con mi gerente y recibido una copia de la póliza de Cracker Barrel Old Country Store sobre la Igualdad de Oportunidades en el Empleo, el Hostigamiento, y la "Puerta Abierta".<br><br>Firma del empleado:_____ Fecha:_____ |

[LOGO]

EMPLOYEE OPEN DOOR REPORT

INVESTIGATION LOG

*To be completed by each investigating Manager*

[CB00472]

This report is different from the Incident Information form, and must be completed with every Open Door Report. It is intended to assist every Manager in the investigation process and keep an accurate account of the steps taken during the process. Review the General Instructions and Guidelines whenever completing an Open Door Report.

Example:

| *Date and time:* | *Who you spoke with and What action was taken:* |
|---|---|
| 1/5/01<br>10:30 A.M. | Spoke with Jane Doe; got written statement will speak with John Doe on 2nd shift. |
| 1/5/01<br>3:00 p.m. | Spoke with John — see statement; he denied called Empl. Relations; spoke with ER Specialist, who advised that John be discharged. |
| 1/6/01<br>2:10 p.m. | John discharged; see counseling |

✓ As the investigating Manager, you must provide the specific date and time of every event during the investigation.

✓ You must provide the name of the witness [the who] and the action taken [the what].

✓ You must get a written statement from every employee you speak with at the time that you speak with them. Not Later. That includes the accuser and the accused.

✓ Act promptly. You may need to separate the accused and accuser by changing schedules, or suspending the accused pending the outcome of the investigation.

✓ Contact your District Manager and the Employee Relations for assistance.

Cracker Barrel Old Country Store, Inc.
INVESTIGATION LOG
*To be completed by each investigating Manager*

| | | |
|---|---|---|
| Store No.: | | |
| Completed By: | | |

| Date and Time | Who you spoke with and What action taken: |
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[CB00473]

File Attachment:

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION**

**No. 03 C 3765**

**[Filed October 6, 2005]**

| | |
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| HEDRICK G. HUMPHRIES, | ) |
| *Plaintiff*, | ) |
| | ) |
| vs. | ) |
| | ) |
| CBOCS WEST, INC., | ) |
| Defendant. | ) |
| | ) |

## MEMORANDUM OPINION

CHARLES P. KOCORAS, Chief District Judge:

This matter comes before the court on the motion of Defendant CBOCS West, Inc. ("Cracker Barrel"), for summary judgment and the motion of Plaintiff Hedrick Humphries to strike the declaration of Kimberly Tramel. For the reasons set forth below, the motion for summary judgment is granted and the motion to strike is denied as moot.

## BACKGROUND

Humphries is a former employee of Cracker Barrel at its restaurant and retail store in Bradley, Illinois. He is African-American. During the three years that Humphries worked for Cracker Barrel, he was never

demoted, nor was his pay ever reduced. He was promoted at least once. Over the last eight months of his employment, Humphries received nine written or verbal warnings with respect to his work performance that were memorialized in written Employee Counseling Reports, or "ECRs." Twice these ECRs informed Humphries that potential disciplinary action included termination. The three penultimate ECRs, issued in early September 2001, stated that they were a "final" warning.

In late November 2001, Humphries informed William Christensen, the district manager for the Bradley restaurant and store, that he felt he and another African-American employee named Venis Green were being treated in a discriminatory manner because of their race.

On the morning of December 3, Joe Stinnett, another associate manager, reported finding the store safe unlocked and slightly open. Cracker Barrel policy requires that an associate manager who closes a store in the evening is responsible for making sure that the store safe is closed and locked before leaving for the night. Humphries was the associate manager on duty the night of December 2. His employment was terminated on December 5. According to Cracker Barrel, this termination occurred because Humphries was on duty the night before the safe was found open; according to Humphries, the termination was the result of Cracker Barrel's desire to retaliate against him for his November comments to Christensen.

Our prior opinions detailed the procedural morass that ensued after Humphries' termination. It is

sufficient to note that, as the case now stands, the only cause of action asserted is founded in 42 U.S.C. § 1981. According to Humphries, Cracker Barrel interfered with his rights to make and enforce contracts to the same extent enjoyed by white citizens. Cracker Barrel moves for summary judgment in its favor on his claims.

## LEGAL STANDARD

Summary judgment is appropriate when the record, viewed in the light most favorable to the nonmoving party, reveals that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The burden then shifts to the nonmoving party to show through specific evidence that a triable issue of fact remains on issues on which the nonmovant bears the burden of proof at trial. *Id.* The nonmovant may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; it must go beyond the pleadings and support its contentions with proper documentary evidence. *Id.* The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. *Bay v. Cassens Transport Co.*, 212 F.3d 969, 972 (7th Cir. 2000). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir. 2000);

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

## DISCUSSION

Though Humphries originally sued under both Title VII and 42 U.S.C. § 1981, we dismissed the Title VII claims on November 1, 2004. Thus, the motion and this opinion focus solely on Humphries' § 1981 claim.[1]

To avoid summary judgment of a § 1981 claim arising from an employment relationship, an employee must show that he or she undertook the statutorily protected action of making or enforcing a contract, an action by the employer that worked to the detriment of the employee, and a causal connection flowing from the former to the latter. *See Herron v. DaimlerChrysler Corp.*, 388 F.3d 293, 301 (7th Cir. 2004). The third element can be established either directly or indirectly. *See Davis v. Con-Way Transportation Central Express, Inc.*, 368 F.3d 776, 783 (7th Cir. 2004). The direct method allows a trier of fact to find discriminatory

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[1] The parties do not address the issue of whether § 1981 applies to termination of an at-will employment relationship. *In Gonzalez v. Ingersoll Mill. Mach. Co.*, the Seventh Circuit opined in dicta that it does not. 133 F.3d 1025, 1035 (7th Cir. 1998). Although the court has not since passed on the question definitively, the text of § 1981, which specifically refers to termination as being within its scope, and at least one subsequent opinion make the continued vitality of *Gonzalez* on this point questionable. *See Walker v. Abbott Laboratories*, 340 F.3d 471, 477-78 (7th Cir. 2003). However, since Cracker Barrel has not pressed this point, we will proceed using the assumption that § 1981 can apply to the situation in this case.

conduct without inference or presumption. *See id.* The evidence necessary to allow a plaintiff to employ the direct method can consist of either an employer's admission that the challenged action was the product of unlawful discrimination or a combination of events that directly indicates that discrimination was afoot. *See id.* Humphries contends that he can proceed under this method under the second route. He asserts that the combination of the short period of time that elapsed between the time that he complained about Cracker Barrel's treatment of Green and him and Cracker Barrel's inaction with respect to his complaints thereafter directly establish a discriminatory motive. Despite Humphries' arguments, this is far from the "convincing mosaic" necessary to point directly to unlawful motivations behind Cracker Barrel's action. *Troupe v. May Dep't. Stores*, 20 F.3d 734, 737 (7th Cir. 1994). At best, this evidence describes a few actions concentrated at the time of termination, not the abrupt about-face or pervasive pattern held sufficient in other cases. *See Lang v. Ill. Dep't of Child and Family Servs.*, 361 F.3d 416, 419-21 (7th Cir. 2003); *Sitar v. Indiana Dep't of Transportation*, 344 F.3d 720, 728-29 (7th Cir. 2003).

The second manner by which discrimination can be shown, the indirect method, consists of a three-step process. *See Gonzalez v. Ingersoll Mill. Mach. Co.*, 133 F.3d 1025, 1032 (7th Cir. 1998). First, the plaintiff must demonstrate a prima facie case for discrimination. *Id.* To make out his prima facie case, Humphries must show that he is a member of a racial minority, that he was meeting Cracker Barrel's legitimate expectations with respect to his job duties, that he suffered an adverse action, and that similarly

situated white employees were treated more favorably than he. *See id.* at 1032, 1035. If Humphries can demonstrate each of these elements, a presumption of unlawful discrimination arises, which Cracker Barrel must counter with a lawful reason for Humphries' termination. *Id.* at 1032. If Cracker Barrel does so, Humphries must then show that the proffered reason is actually a pretext for discrimination. *Id.*

Cracker Barrel challenges Humphries' showing on the second and fourth elements of his prima facie case. With respect to the second, whether Humphries was performing satisfactorily, the parties' arguments clearly indicate that material issues of fact exist. The fourth, however, clearly falls in Cracker Barrel's favor.

Humphries contends that Ken Dowd and Joseph Stinnett, who are both white and who held supervisory positions, provide the necessary points of comparison. According to Humphries, both of these employees were cited for not meeting Cracker Barrel's standards with respect to safeguarding money and other assets of the company. To be similarly situated, two employees must have the same supervisor, engage in the same conduct, have the same qualifications, and have no legitimately differentiating characteristics that would account for an employer's differing treatment. *See Ineichen v. Ameritech*, 410 F.3d 956, 960-61 (7th Cir. 2005). Humphries contends that Dowd and Stinnett engaged in conduct similar to that for which he was terminated, but they kept their jobs. However, he provides no other information about them that would be germane to the inquiry. In other words, he provides evidence that Dowd and Stinnett are comparable to him in one material respect, but by no means in all

material respects. *See Sartor v. Spherion Corp.*, 388 F.3d 275, 279 (7th Cir. 2004). The latter is required to stave off summary judgment. Because Humphries has not offered any employees whom we can determine to be truly similar to him, we have no way to gauge whether Cracker Barrel behaved in a racially discriminatory manner. Because Humphries has not shown each element of his prima facie case, he cannot prevail through the indirect method.

Even if Humphries had offered a similarly situated employee, Cracker Barrel would still be entitled to summary judgment. Viewing the situation from Cracker Barrel's perspective at the time Humphries was fired, there is nothing suspicious about their belief that a violation of their employment policy occurred when the safe was not closed and locked when the store opened on December 3, 2001. *See Stewart v. Henderson*, 207 F.3d 374, 378 (7th Cir. 2000). Because Humphries was the manager on duty the night before, it was his responsibility to make sure that the safe was closed and locked. There is nothing unlawful about an employer terminating an employee who fails to safeguard money and other valuables belonging to the employer.

Humphries counters that this reason is a lie; he supports his belief by stating that the safe was locked and closed when he left on the night of December 2. Even if we assume this is true, it does nothing more than show that Cracker Barrel's belief that Humphries had neglected to perform an important duty was incorrect, not that they did not truly hold the belief. That may show that Cracker Barrel made a mistake, but it is not pretext that would allow Humphries to

overcome the legitimate business reason Cracker Barrel has proffered for terminating his employment. *See id.* Consequently, Cracker Barrel is entitled to summary judgment on Humphries' retaliation claim.

**B. Racial Discrimination**

Although Humphries' complaint contends that his termination was motivated both by racial animus and by retaliation for his prior complaints, it is apparent from the presentation he makes in his opposition papers that only the retaliation claim has any vitality. This is especially true given that his response to Cracker Barrel's claimed entitlement to summary judgment on the discrimination claim consists of a single paragraph that in essence contends that his arguments with respect to the retaliation claim apply directly to his discrimination claim and defeat Cracker Barrel's motion.

This presentation does not carry the day for two reasons. First, undeveloped arguments result in waiver of the positions that otherwise might be permissible. *See, e.g., Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir. 2005). Second, as described above, Humphries' retaliation claim fails as a matter of law. If the same arguments are to apply to his discrimination claim, then it must meet a like fate.

**C. Motion to Strike Declaration of Kimberly Tramel**

In connection with his response to the motion for summary judgment, Humphries moved to strike the declaration of Kimberly Tramel, who identifies herself

only as an employee of Cracker Barrel. Because the assertions contained within the declaration played no part in our decision and in light of the outcome of the motion for summary judgment, the motion to strike is denied as moot.

## CONCLUSION

Based on the foregoing, Cracker Barrel's motion for summary judgment is granted. Humphries' motion to strike the declaration of Kimberly Tramel is denied as moot.

/s/
Charles P. Kocoras
Chief Judge
United States District Court

Dated: October 6, 2005

**IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

**No. 05-4047**

**[Filed February 6, 2007]**

HEDRICK G. HUMPHRIES, *Plaintiff-Appellant*,

v.

CBOCS WEST, INC., *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 03-C-3765 – Charles P. Kocoras, *Judge*.

Argued March 28, 2006 - Decided January 10, 1007

Before EASTERBROOK, *Chief Judge*, and POSNER and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. Hedrick Humphries filed a suit alleging claims of discrimination and retaliation under Title VII and 42 U.S.C. § 1981 against CBOCS West, Inc., based upon his discharge as an associate manager at one of defendant's Cracker Barrel restaurants. After dismissing Humphries's Title VII claims as procedurally barred, the district court granted summary judgment in favor of CBOCS West, Inc. (hereinafter "Cracker Barrel"), holding that

Humphries could not establish his prima facie burden of showing that a similarly situated individual in a non-protected class was treated more favorably. We reverse the district court's grant of summary judgment as to Humphries's retaliation claim because Humphries made a sufficient showing under the indirect method to establish a prima facie case of retaliation under section 1981. We affirm the judgment as to Humphries's discrimination claim because Humphries forfeited this claim by failing to present an adequate argument before the district court.

## I. BACKGROUND

The following facts are recounted in the light most favorable to Humphries, the non-movant. Humphries, an African-American male, was an associate manager at a Cracker Barrel restaurant in Bradley, Illinois. Associate managers at Cracker Barrel are supervised by a general manager, who in turn is supervised by a district manager. In this case, three general managers cycled through during Humphries's three-year tenure: Don Sessions, Steve Cardin and Ken Dowd. His performance during his first two-and-a-half years (roughly February 1999 through mid-July 2001) was generally excellent. For instance, he received annual merit raises and bonuses, and his supervisor (Sessions) testified that he considered Humphries to be his best associate manager. Circumstances changed for Humphries when Cardin took over (as a temporary replacement) for Sessions. According to Humphries, Cardin routinely made racially derogatory remarks, such as stating that all African-Americans are "drunk or high on drugs" or that "all Mexicans have a bunch

of kids." Humphries alleges that other employees confirmed Cardin's inappropriate comments, and told Humphries that Cardin had stated that he was there "for the white people" and was "going to take care of the white people."

Within Cardin's initial month of being the general manager, he issued Humphries five disciplinary reports, called Employee Counseling Reports (ECRs). The ECRs covered a wide range of alleged misconduct, including bank deposit shortages and inappropriate use of Gold Cards to provide complaining customers a free meal. Humphries claims that the ECRs were groundless and reflected Cardin's racial animus. In response, in August or September 2001, Humphries complained to Cardin's supervisor, district manager William Christensen. Christensen, however, appears not to have conducted any investigation of Humphries's claims, contrary to Cracker Barrel policies.

In September 2001, Ken Dowd became general manager (Cardin returned, as planned, to his store). Shortly thereafter, Joe Stinnett, one of Humphries's fellow associate managers, fired an African-American food server, Venis Green, because she purportedly failed to show up for a shift. Humphries complained to both Dowd and Christensen that Stinnett's firing of Green was discriminatory because, among other things, Green had informed both Humphries and another associate manager that she could not work that shift. Moreover, according to Humphries, a white employee had failed to appear at work on several occasions without notice, but was not fired. Humphries also reminded Christensen of his earlier complaints

regarding former-general manager Cardin. According to Humphries, Christensen berated him for "going outside the management group" (i.e., turning to Christensen, rather than Dowd, to complain) and demanded that Humphries schedule a meeting with Dowd for the following week.

This scheduled meeting never occurred because on December 5, 2001 (the day before Humphries's scheduled meeting with Dowd), Christensen fired Humphries, based upon Stinnett's complaint that Humphries had left the store safe unlocked during the evening — a charge that Humphries disputes. Humphries also claims that prior to his firing (and before his alleged failure to lock the safe), a cashier warned him that he should watch himself because Christensen and Stinnett were "up to something." After being informed by Stinnett that Humphries had left the safe unlocked, Christensen immediately terminated Humphries — without interviewing him or investigating the incident to determine whether Humphries had actually left the safe open.

Humphries subsequently brought claims of discrimination and retaliation under Title VII and section 1981. The district court dismissed Humphries's Title VII claims due to procedural deficiencies (and Humphries does not appeal this determination). The district court also granted summary judgment in favor of Cracker Barrel on Humphries's section 1981 claims, finding that Humphries failed to establish his prima facie case under either the direct or indirect method. Humphries now appeals.

## II. ANALYSIS

### A. Historical Overview of Retaliation Claims under Section 1981

Before we turn to the merits of this appeal, we must decide whether Humphries's retaliation claim is cognizable under section 1981. Although Cracker Barrel failed to raise this issue in the district court, it now claims that our decision in *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863 (7th Cir. 2005), precludes Humphries's retaliation claim. In the normal course, when a party fails to present an argument in the trial court, it forfeits the argument on appeal. *See Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 728 (7th Cir. 2004); *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 107-10 (7th Cir. 1990). At oral argument, counsel for Cracker Barrel explained that he did not raise this issue in the district court because *Hart*, which he contended created a change in the law in this circuit, had not yet been issued. Although (as we will explain later), we do not believe that *Hart* changed our jurisprudence regarding section 1981 retaliation claims, we will not penalize Cracker Barrel for failing to raise its argument below.[1]

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[1] We note that there is some confusion in this circuit as to whether an appellee — as opposed to an appellant — who failed to raise to a particular argument in the district court in support of his motion for summary judgment is precluded from raising new arguments in this court to affirm the district court's ruling. *Compare, e.g.*, *Gray v. Lacke*, 885 F.2d 399, 409 (7th Cir. 1989) (holding that appellees waived a claim by failing to raise it in the district court), *and Baskin v. Clark*, 956 F.2d 142, 146 (7th Cir. 1992) (same), *with Transamerica Ins. Co. v. South*, 125 F.3d 392,

Of course, we retain the right to consider forfeited arguments, and may choose to do so "in the interests of justice." *Mass. Bay Ins. Co. v. Vic Koenig Leasing, Inc.*, 136 F.3d 1116, 1122 (7th Cir. 1998); *see also Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749-50 (7th Cir. 1993) (holding that "[i]n the rare case in which failure to present a ground to the district court has caused no one — not the district judge, not us, not the appellee — any harm of which the law ought to take note, we have the power and the right to permit it to be raised for the first time to us"). In this instance, given that our recent *Hart* decision appears to have created some confusion in the district courts and has already been misapplied in several decisions, it is in the interests of justice to clarify the issue of whether retaliation claims are cognizable under section 1981 (and, in so doing, clarify our ruling in *Hart*). *See Amcast*, 2 F.3d at 749-50 (reaching issue not raised below because it was fully briefed on appeal, rested "entirely on a pure issue of statutory interpretation, as to which the district judge's view, while it would no doubt be interesting, could have no effect on our review, which is plenary on matters of law[, and] there is no reason to defer its resolution to

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399 (7th Cir. 1997) ("We certainly agree that the failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver. The urging of alternative grounds for affirmance is a privilege rather than a duty." (quoting *Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996))). We need not resolve this question because we choose to review this issue, irrespective of whether Cracker Barrel forfeited the issue or not.

another case. There will be no better time to resolve the issue than now."); *Mass. Bay Ins. Co.*, 136 F.3d at 1122 (reaching forfeited choice-of-law issue because "we clearly think it is in the interest of justice to insure that district courts conduct choice-of-law analyses when conflicts questions are presented to them").

1. Section 1981's Origin in the Civil Rights Act of 1866

The language codified in section 1981 derives from section 1 of the Civil Rights Act of 1866, a Reconstruction-era statute that is generally recognized as the first significant civil rights legislation enacted by Congress, and is considered the "initial blueprint of the Fourteenth Amendment." *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982); *see generally Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-37, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968) (discussing legislative history and historical context of the Civil Rights Act of 1866); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 711-22, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989) (same); *Patterson v. McLean Credit Union*, 491 U.S. 164, 192-200, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989) (Brennan, J., concurring in part and dissenting in part) (same); Robert J. Kaczorowski, Comment, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 Yale L.J. 565 (1989). The legislative history of the Civil Rights Act of 1866 is complicated — and not without substantial interpretive disagreement. *See generally* George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*,

2003 Sup. Ct. Rev. 303. The Civil Rights Act of 1866 was passed pursuant to section 2 of the Thirteenth Amendment, which provided Congress with the legislative power to enforce the Thirteenth Amendment's prohibition on slavery. U.S. Const. amend. XIII, § 2. The Act was a direct response to the so-called "Black Codes," a series of legislative acts by many southern (and some northern) states in protest of, and as a tacit attack upon, the recently enacted Thirteenth Amendment. The Black Codes imposed onerous legal limitations on newly-freed former slaves in an attempt to circumvent the requirements of the Thirteenth Amendment, and essentially continued a pattern of legal enslavement. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70, 21 L. Ed. 394 (1873) (noting that following the passage of the Thirteenth Amendment, "[a]mong the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value"); *see generally* Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 Harv. J. on Legis. 187, 240-46 (2005) (discussing the Black Codes).

In response to the states' attempts to circumvent the requirements of the Thirteenth Amendment, section 1 of the Civil Rights Act of 1866 conferred a series of legal rights, including the right to contract,

and to hold and convey property, equally to citizens.[2] Portions of section 1 are now codified in section 1981, which states, in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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[2] In 1870, after ratification of the Fourteenth and Fifteenth Amendments, Congress re-enacted the Civil Rights Act of 1866 (via the Enforcement Act of 1870), and then codified it in sections 1977 and 1978 of the Revised Statutes of 1874. The 1870 re-enactment, which followed passage of the Fourteenth Amendment, has caused significant debate regarding whether sections 1981 and 1982 apply to private actors or, instead, are limited to state actors, pursuant to the Fourteenth Amendment. *Compare, e.g.*, *Jones*, 392 U.S. at 436 (concluding that "it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent readoption of the Civil Rights Act were meant somehow to limit its application to state action"), *and Runyon v. McCrary*, 427 U.S. 160, 168-69 n.8, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976) (same), *with Jones*, 392 U.S. at 449-76 (Harlan, J., dissenting) (evaluating the legislative history and concluding that the Act was intended to reach only state actors), *and Runyon*, 427 U.S. at 195-205 (White, J., dissenting) (same). In any event, it is now well-settled that section 1981 applies to private actors. *See Patterson*, 491 U.S. at 171-76 (refusing to overturn *Runyon*'s determination that section 1981 applied to private conduct).

42 U.S.C. § 1981(a). Other portions of section 1 are now codified in section 1982, which states:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982.

2. *Sullivan v. Little Hunting Park, Inc.* Leads Courts To Conclude that Section 1981 Protects Against Retaliation

The Supreme Court has interpreted section 1981 as providing a broad-based prohibition (and federal remedy) against racial discrimination in the making and enforcing of contracts. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459-62, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975). The issue of what types of adverse actions are subsumed under the "make and enforce contracts" provision in section 1981 is not without complication, particularly with respect to so-called "postformation conduct" (i.e., adverse acts, such as harassment or retaliation, that occur after an initial contractual relationship has been established). Before its decision in *Patterson*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (which we shall address below), the Supreme Court had not clearly determined whether section 1981 applied to retaliatory conduct. The closest it came to deciding this issue was in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d

386 (1969). In *Sullivan*, a Virginia nonprofit corporation, created to operate a community park and playground facilities for the benefit of residents, refused a proposed assignment of a membership interest to an African-American man. *Id.* at 234-35. The white homeowner who intended to assign his membership interest protested the corporate board's refusal, and the board expelled him from the corporation. *Id.* at 235. He, along with the would-be assignee, brought suit under sections 1981 and 1982. *Id.* The Court initially noted the "broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived." *Id.* at 237. Relying on the broad protective nature of the Civil Rights Act of 1866, the Court held that the white homeowner had standing to bring a claim under section 1982 (the companion statute to section 1981 pertaining to property rights):

> We turn to Sullivan's expulsion for the advocacy of Freeman's cause. If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in *Barrows v. Jackson*, 346 U.S. 249, 259, 73 S. Ct. 1031, 1036, 97 L. Ed. 1586, that the white owner is at times "the only effective adversary" of the unlawful restrictive covenant. Under the terms of our decision in *Barrows*, there can be no question but that Sullivan has standing to maintain this action.

*Id.* at 237. Although the *Sullivan* court did not explicitly use the term "retaliation" in its decision, it was clear that the white landowner's basis for standing was that he had suffered retaliation for asserting the rights of another (i.e., he had been "punished for trying to vindicate the rights of minorities"). *Id.* (And, indeed, as will be discussed further below, the Supreme Court later interpreted *Sullivan* precisely in this manner in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005).)

Following *Sullivan*, and prior to *Patterson*, the general consensus among the circuits was that section 1981 broadly prohibited discrimination in all contractual facets of the employment relationship, including "postformation" adverse acts, such as retaliation. *See, e.g., Choudhury v. Polytechnic Inst. of New York*, 735 F.2d 38, 42-43 (2d Cir. 1984) (retaliation cognizable under section 1981); *Goff v. Continental Oil Co.*, 678 F.2d 593, 597-99 (5th Cir. 1982) (same); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977) (same); *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1147 (8th Cir. 1981) (same); *London v. Coopers & Lybrand*, 644 F.2d 811, 819 (9th Cir. 1981) (same). This court, however, did not definitively decide this issue in the pre-*Patterson* era. *See Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1313 (7th Cir. 1989) (noting that although "[t]here is a substantial body of court of appeals precedent" holding that section 1981 forbids retaliation, there was "nothing in this circuit").

### 3. *Patterson v. McLean Credit Union* Narrows the Reach of Section 1981

In 1989, the Supreme Court issued its decision in *Patterson*, which severely curtailed the reach of section 1981 claims. The *Patterson* court held that section 1981 protections applied exclusively to two types of rights: the right to make contracts and the right to enforce them. 491 U.S. at 176. The first right is violated by a "refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms." *Id.* at 177. Importantly, however, that right "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment." *Id.* at 176. The second right, the right to enforce contracts, "does not . . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." *Id.* at 177-78. Thus, section 1981's prohibition did not include so-called "postformation" discriminatory conduct of an employer, including the breach of the terms of the contract or imposition of discriminatory working conditions, such as racial harassment. *Id.* at 178-82. *Patterson*, however, was silent as to the issue of retaliation.

Even though *Patterson* involved only racial harassment and the term "retaliation" appears nowhere in the opinion, several circuits — including this one — interpreted *Patterson* as precluding retaliation claims under section 1981 because such employer behaviors purportedly involved now-unprotected postformation conduct. *See, e.g., Gonzalez v. Home Ins. Co.*, 909 F.2d 716 (2d Cir. 1990); *Carter v.*

*South Cent. Bell*, 912 F.2d 832, 838-41 (5th Cir. 1990); *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 107-10 (7th Cir. 1990); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1535 & n.17 (11th Cir. 1990); *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 289 U.S. App. D.C. 332 (D.C. Cir. 1991); *see also Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003) (noting that *Patterson* "marked a dramatic change in § 1981 jurisprudence"); *but see Hicks v. Brown*, 902 F.2d 630, 635-38 (8th Cir. 1990) (holding that *Patterson* did not address retaliation claims and should not be read as foreclosing such claims under section 1981). In the immediate aftermath of *Patterson*, we decided *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989), in which we observed that "*Patterson* might be thought to foreclose any suggestion that retaliation could be actionable under" section 1981. *Malhotra*, 885 F.2d at 1312. Specifically, we noted that "retaliation and discrimination are separate wrongs. A white person who opposes discrimination against blacks and is fired in retaliation for doing so is not being discriminated against because of his race. . . ." *Id.* (citations omitted). At the same time, we also observed that "it can be argued that someone who retaliates against a person who has a claim of employment discrimination that might be actionable under section 1981 . . . is interfering with the person's *ability* to make or enforce contracts on the same footing with white persons and such interference could be thought itself a violation of section 1981." *Id.* at 1313 (citations omitted) (emphasis in original). Of particular note here, we did not decide whether *Patterson* definitively

precluded retaliation claims, and even hinted that such claims "may well survive *Patterson*." *Id.*

In a concurring opinion in *Malhotra*, Judge Cudahy concluded that *Patterson* did not preclude retaliation claims.[3] Specifically, Judge Cudahy observed that there was "little parallel between harassment and retaliation. Hence, the refusal of *Patterson* to countenance harassment claims under section 1981 has only the most superficial application to claims for retaliation."[4] *Id.* at 1314 (Cudahy, J., concurring); *see also Hicks*, 902 F.2d at 635-38 (holding that *Patterson* applied solely to the unique context of racial harassment and did not preclude retaliation claims). And, in prescient comments that anticipated the Supreme Court's result in *Jackson*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361, Judge Cudahy stated:

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[3] *See also Mozee v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1053 (7th Cir. 1991) (suggesting that *Patterson* may not have foreclosed all retaliation claims).

[4] Judge Cudahy also noted that "to the limited extent *Patterson* is relevant here, it would appear to *support* the recognition of a cause of action for retaliatory conduct" because the *Patterson* court recognized that section 1981's right to "enforce contracts" prohibits efforts to "impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations." *Malhotra*, 885 F.2d at 1314 n.1 (citations omitted). "Clearly, when an employer punishes an employee for attempting to enforce her rights under section 1981, this conduct 'impairs the employee's ability to enforce her contract rights.'" *Id.* This is an intriguing argument, but one that we need not revisit in light of our conclusion that retaliation claims are now covered under section 1981's "make and enforce contracts" provision.

> A prohibition against retaliation is a necessary adjunct to the anti-discriminatory provision itself. If an employee may be fired for complaining of discrimination, his right not to be discriminated against is surely vitiated. . . . The recognition of a right of action for retaliation under section 1981 is simply another application of a straightforward syllogism: if an employee is granted certain substantive rights against his or her employer, the employer may not punish the employee's assertion of those rights, since this would allow the employer to take away a right to protection conferred by statute.

*Id.* at 1314-15.

Judge Cudahy's view in *Malhotra* did not carry the day in this circuit during the brief post-*Patterson* era. Shortly thereafter, we issued our *McKnight* decision, where we, like most other circuits, interpreted *Patterson* as foreclosing section 1981 coverage of retaliation claims. *See McKnight*, 908 F.2d at 107-08; *see also Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1471-72 (7th Cir. 1993); *McCarthy v. Kemper Life Ins. Co.*, 924 F.2d 683, 688 (7th Cir. 1991). *But see Hicks*, 902 F.2d at 635-38 (holding that *Patterson* did not foreclose retaliation claims). In *McKnight*, the plaintiff brought suit under section 1981 and Title VII, claiming that his employer had discriminated against him based on his race and had fired him in retaliation for complaining about the discrimination. *McKnight*, 908 F.2d at 107-08. Although we noted that "*Patterson* was a racial-harassment case rather than a discharge case," we

nonetheless held that *Patterson*'s "wide-ranging reexamination of section 1981 indicated (as it seems to us) that claims of racially motivated discharge are not actionable under that statute." *Id.* at 108.

Judge Fairchild, however, concurred and dissented in part from the majority's opinion, because, in his view, *Patterson* "did not expressly assert that a racially discriminatory termination would not be a violation of § 1981." *Id.* at 117. Instead, he reasoned that the analysis in *Patterson* was limited to the narrow issue of whether a change in the conditions of employment following the formation of the employment contract (specifically, racial harassment) — but not a termination — violated section 1981. *Id.* As a result, Judge Fairchild concluded that the right to make contracts established in section 1981 protected "the right to continue to work, in the face of racially discriminatory termination" — a result unaltered by *Patterson*. *Id. But see Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994) (noting that "*Patterson* did not overrule any prior decision of this Court; rather, it held and therefore established that the prior decisions of the Courts of Appeals which read § 1981 to cover discriminatory contract termination were *incorrect*." (emphasis in original)).

4. The Civil Rights Act of 1991 Supercedes *Patterson*

Whether the majority opinion in *McKnight* or Judge Cudahy's or Judge Fairchild's reading of *Patterson* was correct is now irrelevant because *Patterson*'s influence was short-lived. Unhappy with the result issued in

*Patterson*, Congress legislatively superceded the *Patterson* decision by enacting the Civil Rights Act of 1991. *See Rivers*, 511 U.S. at 305-06, 305 n.5 (noting that the Civil Rights Act of 1991 was based on Congressional and Presidential disapproval of the *Patterson* decision); *Walker v. Abbott Labs.*, 340 F.3d 471, 475 (7th Cir. 2003) (noting that "Congress, however, quickly responded [to *Patterson*] with the Civil Rights Act of 1991, which, *inter alia*, overruled *Patterson*"). The legislative history of the Civil Rights Act of 1991 makes clear that Congress was dissatisfied with the Supreme Court's narrow reading of section 1981, which strongly curtailed claims that had been cognizable in the pre-*Patterson* period. *See Rivers*, 511 U.S. at 306 n.6 (citing S. Rep. No. 101-315, pp. 12-14 (1990)). Among other things, Congress added subsection (b) to section 1981, which made clear that section 1981 was to be read broadly to include all aspects of the contractual relationship between parties, including the postformation conduct, which *Patterson* had concluded was not actionable under section 1981:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. § 1981(b). And the legislative history pertaining to this subsection confirms that Congress intended retaliation to be included under this provision. *See Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411 n.12 (11th Cir. 1998) (citing H.R. Rep.

No. 40(I), 102d Cong., 1st Sess. 92 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 630, which states, in part, "[t]he list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for example, this would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, *retaliation*, and hiring." (emphasis added)).

The Civil Rights Act of 1991 led several circuits to reverse course (again) and to allow retaliation claims under section 1981. *See Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998); *Andrews*, 140 F.3d at 1412-13; *see also Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 259 (8th Cir. 1996) (listing the elements for a *prima facie* case of retaliation under section 1981). For instance, in *Andrews*, the Eleventh Circuit noted that prior to *Patterson*, circuits interpreting section 1981's "make and enforce contracts" provisions had held that it "encompassed an employee's claims for an employer's race-based retaliation during the employment contract." 140 F.3d at 1410. It observed that while *Patterson* "drew into question many circuit court decisions recognizing post-hiring discrimination claims under section 1981," the Civil Rights Act of 1991 reversed whatever limits *Patterson* placed on imposing liability for postformation conduct. *Id.* at 1410-12. As a result, the Eleventh Circuit concluded that retaliation claims remained viable under section 1981. *Id.* at 1412.

B. Humphries's Retaliation Claim Is Cognizable Under Section 1981

1. We Hold that Section 1981 Protects Against Retaliation

This is the first opportunity we have had since the enactment of the Civil Rights Act of 1991 to re-visit the issue of whether section 1981 forbids all retaliatory discharge claims.[5] Cracker Barrel contends that our decision in *Hart* has already foreclosed retaliation claims under section 1981. *See Hart*, 426 F.3d at 866. This is incorrect. Unfortunately, *Hart* has already been cited for this inaccurate proposition. *See Williamson v. Denk & Roche Builders, Inc.*, No. 04 C 4051, 2006 WL 1987808, at *4 (N.D. Ill. July 11, 2006) (citing *Hart* for the proposition that "the Seventh Circuit has made clear that a retaliation claim is not viable under Section 1981"); *Franklin v. U.S. Steel Corp.*, No. 2:04 CV 246, 2006 U.S. Dist. LEXIS 17802 at *6, 2006 WL 905914, at *2 (N.D. Ind. Apr. 7, 2006) (same); *Welzel v. Bernstein*, 436 F. Supp. 2d 110, 117 (D.D.C. 2006) (citing *Hart* for the proposition that this circuit, unlike other circuits, precludes retaliation claims under section 1981). Our analysis in *Hart* was limited to the narrow issue of whether an individual who was *not* the subject of discrimination could assert claims of

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[5] In *Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1472 n.2 (7th Cir. 1993) we noted that the Civil Rights Act of 1991 had "overruled" *Patterson*, but nonetheless applied the holding of *Patterson* because the Civil Rights Act of 1991 did not have retroactive reach. We also noted, however, that, as a result, "this case represents one of the few in which we still apply the *Patterson* standards." *Id.*

retaliation for complaining about the discrimination of others.[6] We held that section 1981 did not protect against retaliation in such circumstances. *Hart*, 426 F.3d at 866. But *Hart* has no application to the facts here, where the plaintiff is plainly asserting retaliation stemming from discriminatory acts targeting him. (And, as we shall see below, even *Hart*'s limited holding is no longer good law in light of the Supreme Court's *Jackson* decision.)

Thus, the issue before us is whether section 1981, as amended by the Civil Rights Act of 1991, applies to claims of retaliation. We hold that it does. The plain text of the statute, as amended in 1991, makes clear that section 1981 encompasses the "termination of contracts," and there can be no doubt that a retaliatory discharge is indeed a termination of the employment contract.[7] Indeed, the Supreme Court subsequently interpreted the amended provisions of section 1981 as protecting against "discriminatory contract terminations." *Rivers*, 511 U.S. at 302 (stating that "Section 101 of that Act provides that § 1981's prohibition against racial discrimination in the making and enforcement of contracts applies to all phases and

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[6] Our decision in *Hart* was initially issued as an unpublished order, but, upon motion to publish it filed by a member of the bar, the order was converted to a published opinion.

[7] The at-will nature (i.e., no formal written contract and no specific terms of employment) of the plaintiff's employment here does not preclude the plaintiff from relying on section 1981's provisions pertaining to contracts. *See Walker*, 340 F.3d at 475-77 (holding that at-will employees can state claims under section 1981).

incidents of the contractual relationship, including discriminatory contract terminations"). Now, it may be that, strictly speaking, a discriminatory "termination of contract" is not the same thing as a retaliatory discharge — for instance, analytically, retaliation need not have a discriminatory intent behind it. *See Malhotra*, 885 F.2d at 1312; *Jackson*, 544 U.S. at 185-87 (Thomas, J., dissenting). But the Civil Rights Act of 1991 dispensed with this heightened degree of formalism, and the legislative history confirms that Congress intended retaliation to be included within section 1981. *See Andrews*, 140 F.3d at 1411 n.12. As a result, whatever concerns *Patterson* raised about the postformation nature of retaliatory discharges evaporated with the passage of the Civil Rights Act of 1991. *See id.*; *Rivers*, 511 U.S. at 306 n.6. *But see Rivers*, 511 U.S. at 309 n.8 (noting that the "legislative history of the 1991 Act reveals conflicting views about whether § 101 would 'restore' or instead 'enlarge' the original scope of § 1981") and *id.* at 305 ("A legislative response does not necessarily indicate that Congress viewed the judicial decision as 'wrongly decided' as an interpretive matter. Congress may view the judicial decision as an entirely correct reading of prior law — or it may be altogether indifferent to the decision's technical merits — but may nevertheless decide that the old law should be amended, but only for the future.").

2. Our Holding Is Consistent with *Jackson v. Birmingham Board of Education*, which Affirmed *Sullivan*'s Continuing Validity

Even if the statute were unclear on this issue — after all, the specific word "retaliation" still does not

appear in section 1981[8] — and without turning to the pertinent legislative history, the Supreme Court's recent decision in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005) compels the same result. In *Jackson*, the male coach of a girls' high school basketball team sued the Birmingham Board of Education under Title IX of the Education Amendments of 1972, claiming that the Board retaliated against him for complaining about sex discrimination in the high school's athletic program. *Id.* at 171. Title IX prohibits sex discrimination by recipients of federal education funding, but, like section 1981, it contains no express mention of "retaliation." *Id.* at 173. Instead, Title IX simply prohibits "discrimination." The Supreme Court, however, determined that Title IX's proscription on discrimination necessarily subsumed (and implied) acts of retaliation, which it viewed as simply different forms of discrimination:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to

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[8] *Cf.* 42 U.S.C. § 2000e-3(a) (Title VII) (providing that it is an "unlawful employment practice" for an employer to retaliate against an employee because he has "opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.").

> differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.

*Id.* at 173-74 (citations omitted) (emphasis in original).

The *Jackson* court relied heavily on its prior decision in *Sullivan*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386, where it held that section 1981's companion statute, section 1982, which prohibits discrimination with respect to property rights, contained an implied prohibition against retaliation. *Jackson*, 544 U.S. at 176. Specifically, the *Jackson* court interpreted *Sullivan* as holding that section 1982's general prohibition on racial discrimination, which, like section 1981, makes no mention of retaliation, nonetheless covered "retaliation against those who advocate the rights of groups protected by that prohibition." *Id.* The *Jackson* court also observed that the statutory objective of preventing discrimination would be severely hampered if retaliatory practices were not also banned: "If recipients were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result." *Id.* at 180 (citing *Sullivan*, 396 U.S. at 237). "Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Id.*

Thus, the *Jackson* court appears to have jettisoned our prior observation that "retaliation and discrimination are separate wrongs." *Cf. Malhotra*, 885 F.2d at 1312; *see Jackson*, 544 U.S. at 185-87 (Thomas, J., dissenting)(noting that "[a] claim of retaliation is not a claim of discrimination on the basis of sex" and that "[r]etaliation therefore cannot be said to be discrimination on the basis of anyone's sex, because a retaliation claim may succeed where no sex discrimination ever took place"). Instead, at least for the purpose of interpreting broad statutory discrimination prohibitions that omit specific retaliation provisions, the Supreme Court has determined that retaliation is simply a different form of discrimination, and one that is included within broad-based prohibitions of discrimination. *See Jackson*, 544 U.S. at 175 (distinguishing between the structure of Title VII, which includes express retaliation provisions, and Title IX's "implied" cause of action). Moreover, the *Jackson* court noted that a statute targeting discrimination would necessarily be undercut if retaliatory acts evaded its purview. *Id.* at 180. And although *Jackson* directly targeted Title IX, there is no meaningful analytic distinction that renders the conclusion in *Jackson* inapplicable to section 1981.[9] That is, like Title IX, section 1981

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[9] Our colleague in dissent argues that the analysis in *Jackson* was particularized to Title IX and thus not applicable to our discussion of section 1981. We disagree. In *Jackson*, the Supreme Court relied in large part upon *Sullivan*, a case concerning section 1982. *See, e.g.*, *Jackson*, 544 U.S. at 176 ("Congress enacted Title IX just three years after *Sullivan* was decided, and accordingly that decision provides valuable context for understanding the statute."); *id.* at 177 ("Retaliation for Jackson's advocacy of the

broadly prohibits discrimination (although only Title IX, enacted roughly a century after section 1981, contains the more contemporary term of "discrimination"), fails to list specific discriminatory practices, and omits specific references to retaliation. *See id.* at 175-76.

Indeed, the fact that Title IX omitted any mention of retaliation, even though it was enacted in 1972, eight years after Title VII and its specific inclusion of retaliation provisions, did not trouble the *Jackson* court nor lead it to conclude that Congress must have intended to exclude retaliation from Title IX's coverage. *See id.* To the contrary, the Court looked to its *Sullivan* decision (which was issued three years before the passage of Title IX) and concluded that it provided "a valuable context for understanding" Title IX. *Id.* at 176. Specifically, the Court stated "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [*Sullivan*] and that it expected its enactment [of Title IX] to be interpreted in conformity with [it]." *Id.* (quoting

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rights of the girls' basketball team in this case is discrimination on the basis of sex, just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race."). Therefore, *Jackson*'s reasoning did not depend upon features unique to Title IX, and *Jackson* has implications for cases involving section 1982 and its companion statute — section 1981. Moreover, the *Jackson* Court's reliance upon *Sullivan* affirms *Sullivan*'s continuing validity. Irrespective of our impression of *Sullivan*'s interpretive method, then, we are bound by its holding. That holding, in part, leads us to conclude (as has every circuit to address the question) that a retaliation claim is cognizable under section 1981.

*Cannon v. Univ. of Chi.*, 441 U.S. 677, 699, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979)).

Thus, the foundation of the *Jackson* decision is built squarely upon the Court's prior determination in *Sullivan* that section 1 of the Civil Rights Act of 1866 was intended as a broad prohibition on discrimination that contained an implied cause of action for retaliation. *Id.*; *see Sullivan*, 396 U.S. at 237 ("A narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived."). And there can be no doubt that *Sullivan*'s examination of section 1982 with respect to implied prohibitions on retaliation readily applies to its companion statute, section 1981, given that sections 1981 and 1982 are simply carve-outs of the same section of the Civil Rights Act of 1866, sharing identical historical origins and concerns. *See, e.g.*, *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 384, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982) (noting the shared legislative history between section 1981 and its "companion" section 1982); *Runyon*, 427 U.S. at 170-71 (noting that the holding in *Jones*, 392 U.S. at 437 pertaining to section 1982 necessarily implicated section 1981, given their shared legislative history); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 440, 93 S. Ct. 1090, 35 L. Ed. 2d 403 (1973) (holding that "[i]n light of the historical interrelationship" between sections 1981 and 1982, there was no reason to construe the sections differently solely on the basis that the defendant was a private party); *see also Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977) (holding that "in

view of both Sections 1981 and 1982 being derived from the Civil Rights Act of 1866 and in view of the similarity in language and intent, no reason is seen not to apply the rationale of *Sullivan* in interpreting Section 1981"); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312 n.9 (2d Cir. 1975) (same).

3. Our Holding Is Sensible and Aligned with the Weight of Authority

Accordingly, we join the other circuits that have addressed this issue in the post-Civil Rights Act of 1991 era — all of whom uniformly conclude that retaliation claims are cognizable under section 1981. *See Foley*, 355 F.3d at 339; *Hawkins*, 163 F.3d at 693; *Andrews*, 140 F.3d at 1410-11; *Barge*, 87 F.3d at 259. Not only is this result compelled by the Civil Rights Act of 1991 and corresponding Supreme Court authority, but it is also the sensible result. To hold that section 1981 allows unfettered retaliation is to invite wholesale circumvention (and eventual undermining) of the statute, and it would create perverse incentives for the employer to fire complainants as quickly as possible to thereby limit (or entirely avoid) damages under section 1981. *See, e.g.*, *Goff*, 678 F.2d at 598 (noting that "Section 1981 would become meaningless if an employer could fire an employee for attempting to enforce his rights under that statute"). This is not an insignificant issue, as section 1981 damages often have more teeth than those available under Title VII.

There is no traction in observing that Title VII provides a back-up or competing statutory regime to the plaintiff. *See generally Randolph v. IMBS, Inc.*,

368 F.3d 726, 732 (7th Cir. 2004) (noting the significant overlap and differences in the two statutory schemes). Although the substantive overlap and procedural inconsistencies between section 1981 and Title VII animated the Court's concerns in *Patterson*, Congress is not bothered by this parallel statutory scheme. *See Johnson*, 421 U.S. at 459 ("'[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.' In particular, Congress noted 'that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive.'" (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. at 48, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974) and H.R. Rep. No. 92-238, at 19 (1971)); *see also Patterson*, 491 U.S. at 201-12 (Brennan, J., concurring and dissenting in part) (citing and discussing legislative history indicating that Congress intended to maintain section 1981 and Title VII as "separate, distinct, and independent"); *Randolph*, 368 F.3d at 732. Nor is it our role to attempt to harmonize these statutes or seek to channel particular causes of action toward one or the other statute. Congress has unmistakably provided for two separate regimes to redress, in many instances, identical discriminatory practices in the employment context. The resolution of any inefficiencies resulting from the existence of two parallel (but quite different) statutory regimes that cover similar harms, but contain differing procedural requirements, limitations periods, and remedies, resides with Congress, not us.

### 4. We Overturn *Hart* to the Extent that it Conflicts with *Sullivan* and *Jackson*

We must now briefly return to *Hart*, where we held that a white employee who alleged that he suffered retaliation for supporting his co-worker's charge of discrimination could not maintain such a claim because section 1981 "encompasses only racial discrimination on account of the plaintiff's race and does not include a prohibition against retaliation for opposing racial discrimination." *Hart*, 426 F.3d at 866. In so holding, we relied solely on the Eleventh Circuit's decision in *Little v. United Technologies, Carrier Transicold Division*, 103 F.3d 956 (11th Cir. 1997), which held that a white employee who opposed a co-worker's racially derogatory remark could not bring a section 1981 retaliation claim because he did not contend that the employer "discriminated against him because he was white" (i.e., did not claim direct discrimination). *Id.* at 961. The *Little* decision, however, cited no authority for this proposition, nor did it provide reasoning for this declaration.[10] *Id.* We likely placed too much reliance on *Little*, given that its holding runs squarely against the Supreme Court's *Sullivan* decision, as well as the Court's subsequent decision in *Jackson*, which further solidified *Sullivan*'s holding. *See Sullivan*, 396 U.S. at 237; *Jackson*, 544

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[10] In addition, the Eleventh Circuit subsequently hinted that *Little* may conflict with its decision in *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997), which held that a class of employees could proceed on a section 1981 retaliation claim based on allegations that they were fired for refusing to participate in an employer's discrimination against non-white customers. *See Andrews*, 140 F.3d at 1412 n.14.

U.S. at 173-74; *see also Warth v. Seldin*, 422 U.S. 490, 514 n.22, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (citing *Sullivan* for the proposition that sections 1981 and 1982 are examples of "exceptions" that allow parties "to raise putative rights of third parties," including such situations where a party is "punished" for entering into a contractual relationship with an individual protected under the statute). *Jackson*, which was issued after *Little*, but while the *Hart* appeal was pending, made clear that *Sullivan* prohibits "retaliation against those who advocate the rights of groups protected" by section 1 of the Civil Rights Act of 1866. *Jackson*, 544 U.S. at 176. Thus, *Sullivan* stands for the proposition that a "white owner could maintain his *own* private cause of action under § 1982 if he could show that he was 'punished for trying to vindicate the rights of minorities.'" *Id.* at 176 n.1. Aside from conflicting with *Sullivan* and *Jackson*, the *Little* decision is plainly the minority view among the circuits: the great weight of authority is that individuals who suffer retaliation for opposing the racial discrimination suffered by others have standing to assert retaliation claims under section 1981.[11]

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[11] *See, e.g., Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 14 (1st Cir. 1979) (holding that corporation had standing to bring section 1981 claim and that "to invoke § 1981 or § 1982 one need not be a member of the racial class protected by the statute and one need not even be able to identify any specific member of the class who suffered or may suffer discrimination"); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312 (2d Cir. 1975) (white plaintiff could bring section 1981 claim based upon allegation that his employer "'forced' him into retirement solely because he had sold his house to a black person"); *Liotta v. Nat'l Forge Co.*, 629 F.2d 903, 906-07

As a result, it is clear that our decision in *Hart* cannot survive scrutiny under *Sullivan*, as expanded by the Court in *Jackson*. Moreover, our decision is out-of-step with the outcomes reached in the vast majority

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(3d Cir. 1980) (summary judgment inappropriate where material issues of fact remained regarding section 1981 claim brought by plaintiff who claimed he was discharged for supporting rights of African-American co-workers); *Fiedler v. Marumsco Christian Sch.*, 631 F.2d 1144, 1149 (4th Cir. 1980) (white student protected under section 1981 from retaliation by school because of her association with a black schoolmate); *Pinkard v. Pullman-Standard, a Div. of Pullman, Inc.*, 678 F.2d 1211, 1229 (5th Cir. Unit B 1982) (retaliatory discharge claim allowed under section 1981 where evidence showed plaintiff was discharged for lawful advocacy of minority and union rights); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 575 (6th Cir. 2000) (holding that it was clear under "well-settled" law that a plaintiff "need not have alleged discrimination based upon his race as an African American in order to satisfy the protected status requirement of his claims[,]" but rather plaintiff's advocacy on behalf of minorities was sufficient to allege retaliation under section 1981); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977) (white plaintiff had standing under section 1981 for claim that employer fired him because he objected to discriminatory discharge of an African-American co-worker); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1446-47 (10th Cir. 1988) (white employee fired for helping African-American co-worker file an EEOC claim could state a claim under section 1981); *see also Malhotra*, 885 F.2d at 1316 (Cudahy, J., concurring) (noting that "a white person who is discharged for espousing the rights of minorities could establish that the employer acted with discriminatory intent (as required to state a claim under section 1981); that the racial discrimination was directed at another, rather than directly at the plaintiff, is irrelevant, since it is the plaintiff who is suffering due to the employer's racial discrimination" and citing *Sullivan* and cases from other circuits in support).

of cases outside of our circuit. Accordingly, we overrule our holding in *Hart* on this limited issue.[12] We now hold that a plaintiff may maintain a cause of action under section 1981, where the plaintiff has suffered retaliation for advocating the rights of those protected under section 1981. *See Jackson*, 544 U.S. at 179-80.

C. Humphries Presented a Claim of Retaliation Sufficient to Survive Summary Judgment

Turning to the merits of Humphries's retaliation claim under section 1981, we generally have applied the same prima facie requirements to discrimination claims brought under Title VII and section 1981. *See, e.g., Alexander v. Wis. Dep't of Health & Family Servs.*, 263 F.3d 673, 682 (7th Cir. 2001) (applying same standard to Title VII and section 1981 discrimination claims); *Johnson v. City of Fort Wayne, Ind.*, 91 F.3d 922, 940 (7th Cir. 1996) ("Although section 1981 and Title VII differ in the types of discrimination they proscribe, the methods of proof and elements of the case are essentially identical."); *Randle v. LaSalle Telecomms., Inc.*, 876 F.2d 563, 568 (7th Cir. 1989) ("It is well settled that the methods and order of proof applicable to a claim of disparate treatment under Title VII are equally availing under § 1981."); *see also Patterson*, 491 U.S. at 186 (applying *McDonnell Douglas* framework to section 1981 claims). We see no

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[12] Because this opinion overrules a prior case, it has been circulated in advance of publication to all judges of this court in regular active service pursuant to Seventh Circuit Rule 40(e). A majority did not favor a rehearing en banc on the question of overruling *Hart*, 426 F.3d 863.

reason to apply different requirements between the statutes with regard to retaliation claims. *See Foley*, 355 F.3d at 340 n.8 (approving of the same standard applied to retaliation claims under Title VII and section 1981); *see also Hasan v. Dep't of Labor*, 400 F.3d 1001, 1003-04 (7th Cir. 2005) (applying Title VII prima facie requirements to retaliation cases brought under the Energy Reorganization Act); *Larimer v. I.B.M. Corp.*, 370 F.3d 698, 702 (7th Cir. 2004) (applying Title VII prima facie requirements to retaliation claim under ERISA).

To overcome Cracker Barrel's motion for summary judgment, Humphries may proceed under either the direct or indirect methods. *See Sitar v. Ind. Dep't of Transp.*, 344 F.3d 720, 728 (7th Cir. 2003) (citing *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640 (7th Cir. 2002)). Under the direct method, Humphries must present direct evidence of (1) a statutorily protected activity; (2) a materially adverse action taken by the employer; and (3) a causal connection between the two. *Id.*; *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415, 165 L. Ed. 2d 345 (2006). Under the indirect method, he must show that after opposing the employer's discriminatory practice only he, and not any similarly situated employee who did not complain of discrimination, was subjected to a materially adverse action even though he was performing his job in a satisfactory manner. *See Sylvester v. SOS Children's Villages Ill., Inc.*, 453 F.3d 900, 902 (7th Cir. 2006); *White*, 126 S. Ct. at 2415. Thus, the indirect "method of establishing a prima facie case requires proof both of similarly situated employees and of the plaintiff's performing his job satisfactorily." *Sylvester*, 453 F.3d at 902.

Under the district court's view (which, naturally, Cracker Barrel echoes on appeal), Humphries's prima facie case failed because, among other reasons, he did not present sufficient evidence to meet the similarly situated requirement under the indirect method.[13] According to Cracker Barrel, similarly situated comparators *must* have the same supervisors, the same job duties, the same work performance histories, and must have engaged in the same bad conduct as the plaintiff. In other words, they must be essentially identical to the plaintiff, and, under Cracker Barrel's view, Humphries's two comparators, Stinnett and Dowd, fail that test.

Cracker Barrel's view of our similarly situated requirement is too rigid and inflexible. This requirement "should not be applied mechanically or inflexibly." *Hull v. Stoughton Trailers, LLC*, 445 F.3d 949, 952 (7th Cir. 2006). True, we have sometimes stated the similarly situated requirement in the "must" terms that Cracker Barrel argues, but a more sensitive reading of our cases indicates that we have often stated that the similarly situated requirement "*normally* entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Radue v. Kimberly-Clark Corp.* 219 F.3d 612, 617-18 (7th Cir. 2000)

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[13] We need not decide whether Humphries has enough evidence under the direct method because he meets the requirements of the indirect method.

(emphasis added); *see also Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 644 (7th Cir. 2006); *Ezell v. Potter*, 400 F.3d 1041, 1049-50 (7th Cir. 2005); *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004); *Lucas v. Chi. Transit Auth.*, 367 F.3d 714, 733 (7th Cir. 2004); *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 580 (7th Cir. 2003); *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 546 (7th Cir. 2002); *Snipes v. Ill. Dep't of Corr.*, 291 F.3d 460, 463 (7th Cir. 2002); *Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 330 (7th Cir. 2002). In other words, we have emphasized that the similarly situated inquiry is a flexible one that considers "all relevant factors, the number of which depends on the context of the case." *Radue*, 219 F.3d at 617. "As to the relevant factors, an employee need not show complete identity in comparing himself to the better treated employee, but he must show substantial similarity." *Id.* at 618; *see also Goodwin v. Bd. of Trs. of Univ. of Ill.*, 442 F.3d 611, 619 (7th Cir. 2006); *Ezell*, 400 F.3d at 1050.

In addition, our case law does not provide any "magic formula for determining whether someone is similarly situated." *Chavez v. Ill. State Police*, 251 F.3d 612, 636 (7th Cir. 2001) (discussing the similarly situated requirement in the equal protection context). Instead, courts should apply a "common-sense" factual inquiry — essentially, are there enough common features between the individuals to allow a meaningful comparison? *Id.* (citing *Freeman v. Madison Metro. Sch. Dist.*, 231 F.3d 374, 382-83 (7th Cir. 2000) and *Radue*, 219 F.3d at 619). Put a different way, the purpose of the similarly situated requirement is to eliminate confounding variables, such as differing

roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable: complaints about discrimination. *See Hull*, 445 F.3d at 951-52.

It is important not to lose sight of the common-sense aspect of this inquiry. It is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees — distinctions can always be found in particular job duties or performance histories or the nature of the alleged transgressions. *See, e.g.*, *Ezell*, 400 F.3d at 1050. Now, it may be that the degree of similarity necessary may vary in accordance with the size of the potential comparator pool, as well as to the extent to which the plaintiff cherry-picks would-be comparators, *see Crawford v. Ind. Harbor Belt R.R. Co.*, 461 F.3d 844, 845-46 (7th Cir. 2006), but the fundamental issue remains whether such distinctions are so significant that they render the comparison effectively useless. In other words, the inquiry simply asks whether there are sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other prima facie evidence, would allow a jury to reach an inference of discrimination or retaliation — recall that the plaintiff need not *prove* anything at this stage.

Establishing a prima facie case should not be such an onerous requirement: "the plaintiff's evidence on the prima facie case need not be overwhelming or even destined to prevail; rather, the plaintiff need present only 'some evidence from which one can infer that the employer took adverse action against the plaintiff on the basis of a statutorily proscribed criterion.'"

*Bellaver v. Quanex Corp.*, 200 F.3d 485, 493 (7th Cir. 2000) (quoting *Leffel v. Valley Fin. Servs.*, 113 F.3d 787, 793 (7th Cir. 1997) (also noting that the prima facie burdens "should not be applied rigidly")); *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous."). "The prima facie case, and specifically its fourth prong, are meant to identify situations where the 'actions taken by the employer, . . . if unexplained, are more likely than not based on consideration of impermissible factors.'" *Collier v. Budd Co.*, 66 F.3d 886, 890 (7th Cir. 1995) (quoting *Allen v. Diebold, Inc.*, 33 F.3d 674, 678 (6th Cir. 1994)). But the method of inquiry established by *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978). After all, our intention in establishing the similarly situated requirement was to provide plaintiffs the "boost" that the *McDonnell Douglas* framework intended. *See Stone*, 281 F.3d at 643.

With this legal and policy backdrop in mind, we now turn to the would-be comparators in this case. It is clear that Stinnett was a sufficient comparator. He held the same associate manager position as Humphries, with the same duties, including responsibility for ensuring the safe was locked at all times. He shared the same supervisor (Dowd) and same ultimate decisionmaker (Christensen). Like Humphries, Stinnett had received past negative performance evaluations, including low ratings on "asset protection" categories. In addition, Humphries presented competent testimony (both his own and that

of a co-worker) that Stinnett — like Humphries — had used a so-called Gold Card to pay for a meal that a customer had complained about, apparently in contravention of Cracker Barrel policy. In addition, Humphries presented evidence that Stinnett's termination of Green (the immediate precursor event connected to Humphries's termination) was impermissible (under Cracker Barrel policy, only general managers, not associate managers, can fire employees). If anything, the record tends to suggest that Humphries generally performed slightly better than Stinnett. In addition, Humphries presented evidence that Stinnett also left the safe unlocked. Specifically, Humphries testified that Stinnett (and Dowd) routinely left the safe unlocked — the very basis for which Humphries was fired, and one which Humphries hotly disputes.

Cracker Barrel seeks to distinguish Stinnett on the grounds that he left the safe unlocked during the *daytime* (i.e., business hours) whereas Humphries left it unlocked during the *nighttime* (i.e., overnight). This is a distinction without much difference. Although arguments can be made as to relative greater potential harm of leaving the safe unlocked at night, the issue remains that it was contrary to Cracker Barrel policy to leave the safe unlocked and unattended at any point during the 24-hour day. More importantly, Cracker Barrel's argument here reflects precisely the type of formalistic argument that should not carry the day at summary judgment. Humphries was not required to show an identity of wrongful conduct: "the law is not this narrow." *Ezell*, 400 F.3d at 1050. It was enough to show "similar — not identical — conduct" and this surely qualifies under that standard. *Id.* To find

otherwise is to lose sight of the big-picture, common-sense perspective. Thus, in terms of job titles, work duties, supervisor, and work performance histories, Stinnett and Humphries have more than sufficient similarity. A single comparator will do; numerosity is not required.[14] *See, e.g.*, *Goodwin*, 442 F.3d at 619; *Ezell*, 400 F.3d at 1050.

Cracker Barrel also contends that it established that it had a legitimate reason for firing Humphries, and that Humphries failed to show that the reason that Cracker Barrel provided for his discharge was pretext (i.e., a lie). *See Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 417-19 (7th Cir. 2006) (discussing general requirements to establish pretext). On these issues, we agree with the district court's determination that the record is replete with contested material facts pertaining to Humphries's work performance and the nature of Christensen's beliefs when he terminated Humphries. As an initial matter, Humphries contends that he did not leave the safe unattended, and the evidence implicating him is comprised solely of the testimony from Stinnett — the very individual Humphries targeted in his final complaint of discrimination. And there is testimony in the record that a co-worker observed Stinnett and Dowd acting differently (less deferentially) toward Humphries just prior to his firing, and that this co-worker specifically warned Humphries about Stinnett and Dowd because she believed that their behavior indicated that they were "up to something to harm Humphries." In

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[14] Because we conclude the Stinnett was an adequate comparator, we need not address whether Dowd fits the requisite criteria.

addition, prior to firing Humphries, it appears that Christensen conducted no investigation into the veracity of Stinnett's claim. He did not interview Humphries; he simply credited Stinnett's story. Finally, the timing of Humphries's firing is suspicious: he was fired one week after he complained to Christensen about discriminatory practices and one day prior to a scheduled meeting with Dowd, which, presumably would have created a more elaborate (and less favorable to Cracker Barrel) documentary record of Humphries's complaints. Finally, there was evidence in the record tending to show that similar transgressions were not sufficient to fire other similarly situated employees who did not complain of discrimination. *See generally Curry v. Menard, Inc.*, 270 F.3d 473, 479 (7th Cir. 2001) (holding that a showing that similarly situated employees were treated differently may be enough to establish pretext).

This is not to say that merely pointing to an employer's shoddy investigatory efforts is sufficient to establish pretext. Erroneous (but believed) reasons for terminating an employee are not tantamount to pretextual reasons. *See Forrester*, 453 F.3d at 419; *Little v. Ill. Dep't of Revenue*, 369 F.3d 1007, 1012-13 (7th Cir. 2004). But, under the circumstances here, there was sufficient other circumstantial evidence in the record to support a reasonable inference that Humphries was "set-up" by Stinnett (in tandem with Dowd and Christensen), *see Sylvester*, 453 F.3d at 905, and that his purported bad act of leaving the safe unlocked was a fabrication to justify his firing. In this sense, the quality of Christensen's investigation may have some bearing on the truthfulness of Cracker

Barrel's proferred reasons for terminating Humphries. In short, these are the sort of disputed factual issues that a jury should sort out.

As a final note, on remand, Humphries will have only his claim of retaliation. We agree with the district court's determination that he waived (forfeited would be the better term) his discrimination claim by devoting only a skeletal argument in response to Cracker Barrel's motion for summary judgment. Although Humphries did attempt to incorporate his well-developed arguments pertaining to the retaliation claim, and there is substantial over-lap with regard to the prima facie requirements between the two claims, he did nothing more. On appeal, however, Humphries addresses for the first time the issue of his replacement, and Cracker Barrel outlines a series of arguments as to why Humphries's reprimands and warnings do not constitute materially adverse employment actions. None of these arguments were reached by the district court nor flushed out in the briefing — this is precisely why we insist on parties raising all pertinent arguments below. Given that Humphries's core claim is one for retaliation, there is little inequity in applying our typical forfeiture rule to this particular claim.

## III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's grant of summary judgment in favor of the defendant on Humphries's retaliation claim, we AFFIRM the grant of summary judgment in favor of the defendant on Humphries's discrimination claim, and

we REMAND for further proceedings in accordance with this opinion.

EASTERBROOK, *Chief Judge*, dissenting in part. The Supreme Court held in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005), that Title IX of the Education Amendments of 1972 — which forbids educational programs that receive federal funds from discriminating on account of sex, 20 U.S.C. § 1681(a) — allows the judiciary to define the word "discriminate." The Court used that authority to curtail steps that make reports of discrimination costly to students and employees. Today this court attributes to *Jackson* the conclusion that *all* federal statutes dealing with the employment relation prohibit retaliation.

The Justices gave three principal reasons for their decision in *Jackson*. (1) The word "discrimination" has sufficient ambiguity to permit a reading that includes an anti-retaliation norm. 544 U.S. at 173-74. (2) Title IX was enacted in 1972, after anti-retaliation norms became common, making it sensible to resolve the ambiguity in favor of this reading. 544 U.S. at 176. (3) Lack of an anti-retaliation norm would make it too easy for educational programs to undermine the principal substantive rules in Title IX by getting rid of anyone who tried to enforce them. 544 U.S. at 180-81.

None of these reasons applies to 42 U.S.C. § 1981, the subject of today's decision. (1) The word "discriminate" does not appear in § 1981. What that statute provides is that all citizens have the same right to make and enforce contracts. How can a

decision that resolves ambiguity in the word "discriminate" apply to other statutes with different language? (2) Section 1981 was enacted in 1866, long before anti-retaliation norms were created. The first mention of "retaliatory discharge" in any federal appellate opinion came in *NLRB v. Arthur Winer, Inc.*, 194 F.2d 370 (7th Cir. 1952), and the first use by the Supreme Court was *NLRB v. Scrivener*, 405 U.S. 117, 92 S. Ct. 798, 31 L. Ed. 2d 79 (1972). (3) Lack of an anti-retaliation norm in § 1981 would not hinder enforcement of civil rights laws, because there is a *real* anti-retaliation rule in Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e-3(a). That's one reason why *Jackson* distinguished Title IX of the 1972 Act from Title VII of the 1964 Act. 544 U.S. at 175. *Cf. Garcetti v. Ceballos*, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (holding that there is no general anti-retaliation doctrine under 42 U.S.C. § 1983).

The question at issue today is not whether an employer may fire a worker who protested discrimination, but whether an employee may present a claim of retaliation even though he failed to file a timely charge under Title VII and engage in conciliation before turning to court. By adding an anti-retaliation rule to § 1981, the majority does not craft an ancillary doctrine necessary to make the principal norm work (as the Court did in *Jackson*); instead it demolishes components of Title VII that Congress thought necessary to expedite the resolution of disputes and resolve many of them out of court.

This is not the first time that a disgruntled employee has turned to § 1981 after missing the deadline for litigation under Title VII. The Court held

in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), that § 1981 should be construed when possible to avoid conflict with Title VII. Today, however, the majority does exactly what *Patterson* forbids. It reads § 1981 to have the same substantive content as Title VII, but without features such as short periods of limitations that employees find inconvenient. That's not a sound way to treat this statute, already extended far beyond its original meaning. *See Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976); Charles Fairman, VI *History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88 (Part One)* 1207-60 (1971); Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89. *Patterson* holds that the process of judicial extension must stop.

Congress can add to a law's reach, and in 1991 it did so — but the 1991 revision does not mention "retaliation" or change the text of § 1981(a), on which Humphries's claim rests. When § 1981 and Title VII have different but overlapping provisions (as they do, for example, with respect to damages), then the judiciary must enforce both. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 273, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (2003); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 141-44, 122 S. Ct. 593, 151 L. Ed. 2d 508 (2001); *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004). But the fact that overlapping systems may coexist does not justify *creating* incompatibility, as the majority does today. Section 1981 does not contain an anti-retaliation rule. When deciding whether to add such a rule to § 1981,

we must consider the effect that this step would have on Title VII. That's the holding of *Patterson*.

To the extent that my colleagues treat the 1991 legislation as discarding *all* of *Patterson*, they follow an approach that was rejected in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994), and *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). Legislation does not "overrule" decisions of the Supreme Court; new statutes adopt new rules but leave in place existing norms that the legislation does not touch. Nothing in the Civil Rights Act of 1991 justifies reading § 1981 more broadly than its (amended) text or undermining parts of Title VII that remain in force. The Court demonstrated this in *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 126 S. Ct. 1246, 163 L. Ed. 2d 1069 (2006), which unanimously reversed a decision that had invoked the judges' views of wise public policy to extend § 1981. *Domino's Pizza* shows that *Patterson* cannot be treated as defunct. The Supreme Court has cited *Patterson* favorably in 24 decisions since *Landgraf* and *Rivers*. Of these, *Domino's Pizza* is the most salient because it uses *Patterson*'s interpretive methodology to construe § 1981 as amended by the Civil Rights Act of 1991.

My colleagues end up declaring that the text of §1981, its context, its history (the absence of anything like an anti-retaliation norm in 1866), its function, and the effect of an inventive reading on the operation of Title VII all are irrelevant. The rule they impute to *Jackson* has no moorings in any statute's text or provenance. Yet that's not at all what *Jackson* says; it dealt with the actual language and operation of Title

IX and does not justify a language-and-history-free interpretation of all federal statutes. I do not think it likely that the Supreme Court, which insists that statutory language be followed even if inconvenient or jarring — *see, e.g.*, *Arlington Central School District v. Murphy*, 126 S. Ct. 2455, 2463, 165 L. Ed. 2d 526 (2006); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2625-27, 162 L. Ed. 2d 502 (2005); *Dodd v. United States*, 545 U.S. 353, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005); *Tyler v. Cain*, 533 U.S. 656, 663 n.5, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001) — would accept such an atextual approach. I appreciate the temptation to make every law "the best it can be," but that is not the Supreme Court's current mode of statutory interpretation, as *Domino's Pizza* shows for § 1981 in particular.

Perhaps it *was* the approach that prevailed in 1969, when the Court decided *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969). The majority in *Sullivan* held that a plaintiff in litigation under 42 U.S.C. § 1982 has standing to complain about retaliation, and *Jackson* concluded that it must have had a substantive component too. So read, *Sullivan* is of a piece with other decisions holding that judges may supplement statutes to make them "more effective." *See, e.g.*, *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964). But *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), abandoned that approach, and since the 1970s the Court has lashed interpretation more closely to statutory text. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very

essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987) (emphasis in original).

It is anachronistic to say that, because *Sullivan* engaged in a freewheeling "interpretation" of § 1982, we may today take liberties with § 1981. One might as well cite *Borak* for the proposition that "every right implies a remedy" so that courts should today create a private right of action for every statute other than those that the Supreme Court addressed in *Cort* and its successors.

Yet that is the majority's tack. The argument goes that, because *Sullivan* ignored the language of § 1982 and drafted an "improved" version of the statute, we are free to do the same today for § 1981, its neighbor. The Supreme Court requires us to proceed otherwise. *Borak* dealt with § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a). It was as freewheeling in "interpreting" that law as *Sullivan* was with § 1982. Yet the Court has held that the change of interpretive method announced in *Cort* applies to all other sections of the Securities Exchange Act. *See Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 97 S. Ct. 926, 51 L. Ed. 2d 124 (1977) (§ 14(e)); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979) (§ 17(a)). *Borak* and similar decisions from the 1960s have not been overruled, but we have been told in no uncertain terms that they must not be extended. Indeed, in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 111 S. Ct. 2749, 115 L. Ed.

2d 929 (1991), the Court declined to apply *Borak* to a portion of § 14(a) that had not been involved in *Borak*. So that case has been limited to a single sentence of one subsection. Why, then, may the method of *Sullivan* be applied to other sections of the Civil Rights Act of 1866 despite intervening precedent?

There has been a sea change in interpretive method between *Sullivan* and today — and *Patterson* not only exemplifies the change but also applies it to § 1981. In 1989 the Justices were invited to rely on *Sullivan* as a model for the interpretation of § 1981. They declined. Less than a year ago, in *Domino's Pizza*, the Court reiterated Patterson's interpretive stance. *Sullivan*, by contrast, did not receive a mention. Yet my colleagues do not mention *Domino's Pizza*. Why bypass the Supreme Court's 2005 understanding of § 1981 in favor of a 1969 understanding of § 1982? We must respect our superiors' decision to call a halt to judicial extrapolation; *Domino's Pizza* rather than *Sullivan* exemplifies the appropriate judicial role. By relying on *Sullivan*, my colleagues indulge an assumption — that if some remedies are good, then more must be better — that has no support on today's Supreme Court.

Now if § 1981 had been enacted while the freewheeling approach of *Sullivan* was in force, it might well be appropriate to adopt a goal-driven reading. To use the interpretive tools of the last 30 years to unravel a statute passed in earlier days would be to cross up the legislature. That was a point the Court made in *Jackson*: Title IX was enacted in 1972, and Congress may well have anticipated that *Sullivan*-like construction would follow. 544 U.S. at 176. The legislators who voted for § 1981 in 1866 would not

have anticipated any such judicial liberties, however; and when § 1981 was amended in 1991, decisions such as *Cort* and *Rodriguez* and *Patterson* had announced a textual approach. So when a question arises in 2006 about the meaning of this 1866/1991 legislation, our job is to apply the interpretive norms that prevailed in 1866, 1991, and today, not to take an ambiguous decision from 1969 and see how far we can run with it.

Section 1981 does offer one opening for a claim in the nature of retaliatory discharge. Suppose Cracker Barrel regularly fired black employees who protest discrimination in the workplace, but not protesting white employees. Then it might be appropriate to conclude that black persons do not enjoy the same right as white persons to contract with Cracker Barrel. But Humphries does not make such an argument. For all this record shows, Cracker Barrel fires every complainer, without regard to the subject of the complaint. An employer that treats everyone the same in this respect complies with § 1981, so the judgment should be affirmed.

A true Copy:

Teste:

/s/_____

*Clerk of the United States Court of Appeals for the Seventh Circuit*